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## Storied Pasts: Credibility and Evolving Norms in Asylum Narratives 1989–2018

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## Storied Pasts: Credibility and Evolving Norms in Asylum Narratives 1989–2018

Abigail Stepnitz<sup>†</sup>

### Abstract

This Article develops a framework for understanding the emergence and evolution of structural and substantive norms in asylum narratives over time. First, I offer a historical framework which shows how these norms evolve as a result of combined legal, political, cultural, and institutional changes. Institutional norms are infused with politics. Due to this politicization, they undergo processes of bureaucratization and change in response to imperatives and opportunities presented by social and cultural shifts in the way asylum is framed. Second, drawing on a sample of 120 affirmative asylum claims filed between 1989 and 2018, I offer an empirical analysis which reveals the rise of a contemporary system in which competing demands on asylum stories severely limit how those seeking protection can communicate about their experiences. The result is a legal and institutional environment in which asylum seekers must respond to demands for increasing conformity to institutional expectations about how experiences are narrated by adhering to a progressively more formalized, legally, and institutionally legible structure for narrating experiences of persecution or fear.

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“In today’s normal world, which by convention and contrast we call from time to time ‘civilized’ or ‘free,’ one almost never encounters a total linguistic barrier, that is, finds oneself facing a human being with whom one must absolutely establish communication or die, and then is unable to do so.”  
– Primo Levi<sup>1</sup>

“The exclusion from this country of the morally, mentally, and physically deficient is the principal object to be accomplished by the immigration laws.”  
– Frank Sargent, Commissioner General of Immigration<sup>2</sup>

### Introduction

In the United States, despite significant growth and standardization since its conception in the 1950s, the legal and administrative architecture that makes up the asylum process remains heavily politicized, sensitive to cultural changes, and discretionary. The complexity of asylum adjudication processes reflects a legally and culturally fraught space in which law, discretion, and culture create imperfect institutional contexts to evaluate asylum seekers’ truths.

Sitting at the heart of determining eligibility for asylum—an outcome that for many means the difference between life and death—is the importance of telling a credible story. Asylum seekers must convince decision-makers that they have a credible story of persecution or a credible fear of being harmed if they are returned to their country of origin.<sup>3</sup> Asylum seekers are generally able to tell these stories in two ways: through written narratives, also called declarations, which accompany an asylum claim,<sup>4</sup> and through oral evidence, given either during interviews

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1. PRIMO LEVI, *THE DROWNED AND THE SAVED* 88 (Raymond Rosenthal trans., Summit Books 1988) (1986).

2. U.S. BUREAU OF IMMIGR., ANNUAL REPORT OF THE COMMISSIONER OF IMMIGRATION 62 (1907).

3. See, e.g., 8 U.S.C. § 1158; 8 U.S.C. § 1225; 8 C.F.R. § 208.9 (2022); 8 C.F.R. § 208.30 (2022); *Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> [<https://perma.cc/4W7S-39R3>].

4. See U.S. CITIZENSHIP & IMMIGR. SERVS., I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL 6 (Oct. 12, 2022) <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf> [<https://perma.cc/JFP4-WSFV>] [hereinafter I-589 INSTRUCTIONS]; *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> [<https://perma.cc/68TP-43RJ>]; *Asylum Manual*, IMMIGR. EQUAL. <https://immigrationequality.org/asylum/asylum-manual/application-process-preparing-the-asylum-declaration/> [<https://perma.cc/VY8N-RE2Z>].

or in courtrooms.<sup>5</sup> Having a narrative that a decision-maker perceives to be credible is “fundamental,” and is, in many cases “the deciding factor.”<sup>6</sup>

Despite its importance to the asylum process, neither the institutional environment in which claims are adjudicated, nor the claims themselves reveal a singular, stable vision of what it means to construct a credible narrative. Being perceived as credible is essential, yet credibility is almost impossible to define. Rather, credibility in asylum cases is an institutional logic. It is central to the governance of asylum—imbedded in the policies, practices, discourses, and technologies deployed by the State to control asylum seekers specifically, and migrants generally.<sup>7</sup> The shifting expectations for asylum narratives and the ways that narrators attempt to meet those expectations reveal an important tension in law. The inherent ambiguity in credibility offers a powerful and politically responsive way to shape and control asylum.

Those who seek protection must have narratives that do more than simply recount true events. They must adhere to shifting political, legal, and cultural tests of credibility. In this Article, I argue that credibility in asylum is not given definition, but it is given meaning, power, and possibility through the asylum process. This imbuing of meaning happens as institutional norms are infused with politics, undergo processes of bureaucratization, and evolve in response to imperatives and opportunities presented by social and cultural shifts in the way asylum is framed. The substance of credibility then takes shape in the narratives of those seeking protection. In this Article, I focus on the affirmative asylum process, wherein claims are filed by individuals who are not already facing removal or other immigration enforcement.<sup>8</sup> These asylum seekers must navigate a complex administrative adjudication process in which one would recognize few of the procedural or substantive protections that might be expected in a legal proceeding with life and death outcomes.

This Article develops a framework for understanding the emergence and evolution of structural and substantive norms in asylum narratives in this politically charged and highly discretionary legal and institutional environment. It further analyzes the extent to which competing and shifting pressures shape and constrain the way that protection claims can be communicated. I offer a historical framework for

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5. See 8 C.F.R. § 1208.30 (2022); *Obtaining Asylum in the United States*, *supra* note 4; *Credible Fear Screening*, *supra* note 3.

6. U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO DIRECTORATE OFFICER TRAINING: CREDIBILITY 10 (2016) [hereinafter 2016 TRAINING].

7. See, e.g., Anna Triandafyllidou, *Beyond Irregular Migration Governance: Zooming in on Migrants' Agency*, 19 EUR. J. MIGRATION & L. 1–10 (2017) (introducing case studies that examine how migration control and management affect irregular migration by focusing on migrants as the main agents of the migration process).

8. Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208(a) (2022).

understanding both how credibility operates *top-down* in the discretionary asylum landscape, and *bottom-up* through individuals' attempts to craft credible narratives that make their lives and experiences legally and institutionally legible.<sup>9</sup> To reveal this bottom-up approach, I present empirical analysis of 120 affirmative asylum claims filed in the United States between 1989 and 2018.

My analysis reveals how, in the pursuit of credibility, asylum claims increasingly conform to institutional expectations of narration. Over time, these claims have adhered to a progressively more formalized, legally and institutionally legible structure for narrating experiences of persecution or fear. Yet, to maintain credibility, claims rooted in distinct types of persecution diverge substantively, reflecting bottom-up attempts to tell credible stories about certain types of violence.

This Article proceeds in six sections. I begin in Part I by situating the project in the literatures on asylum, narrative, and institutions. In Part II, I discuss the emergence and theoretical significance of credibility and how it is given meaning, power, and possibility through institutional and narrative norms. In Part III, I offer a historical framework for understanding the cultural landscapes in which asylum was developed. This framework also situates the legal and organizational developments that gave rise to both the ideological orientation of and material structures that make up the asylum system. In Part IV, I discuss my empirical data and methods. In Part V, I present the findings of my content analysis of 120 affirmative asylum narratives filed between 1989 and 2018, which include four categories of experiences underpinning the claims: LGBT identity; sexual and gender-based violence (SGBV); political opposition; and displacement as a result of revolutionary civil conflict. This analysis allows us to see the evolution of these narrative norms *on the ground*. Finally, in Part VI, I conclude by discussing my findings and their relevance for both the study of immigration and asylum, as well as for future work on the intersection between institutions, law, and culture.

## I. Seeking and Narrating Asylum

Upon arrival in the United States, asylum seekers undergo screening that is ostensibly intended to determine whether they have a “credible fear” of persecution.<sup>10</sup> From the beginning of the process, the asylum seeker must make their pain and fear cognizable by establishing and performing their “truth” across different social and cultural contexts. Whether one meets this first legal test, then, operates in some ways like other statuses given shape by immigration law. Immigration law is a

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9. See discussion *infra* Section IV.B.

10. 8 C.F.R. § 208.30 (2022).

powerful structural force capable of shaping all aspects of immigrants' lives. From housing,<sup>11</sup> to educational attainment and trajectories,<sup>12</sup> to social integration and support,<sup>13</sup> immigration policy has the power to create—and destroy—immigrants' social and political statuses.

The bulk of existing research on the U.S. asylum process tends to focus on defensive claims and on courtroom interactions, both of which come at the end of the legal process and occur only for some claimants.<sup>14</sup> These cases may seem more interesting or important as they come with higher error cost. As one Immigration Judge put it, asylum hearings are akin to trying “[d]eath penalty cases in a traffic court setting,”<sup>15</sup> where the risk of removal is imminent; the success rates are low<sup>16</sup> and vary

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11. See, e.g., Anita I. Drever & Sarah A. Blue, *Surviving Sin Papeles in Post-Katrina New Orleans: An Exploration of the Challenges Facing Undocumented Latino Immigrants in New and Re-Emerging Latino Destinations*, 17 *POPULATION, SPACE & PLACE* 89 (2011) (discussing obstacles faced by undocumented immigrants due to their limited access to things such as financial institutions in the United States, social and economic safety nets, and transportation); Emily Greenman & Matthew Hall, *Legal Status and Educational Transitions for Mexican and Central American Immigrant Youth*, 91 *SOC. FORCES* 1475 (2013) (investigating how the legal status of Mexican and Central American immigrant youth impacts educational attainment).

12. See Roberto G. Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, 76 *AM. SOC. REV.* 602 (2011) (examining the impact that transitioning to adulthood, and thus from a protected to an unprotected status, impacts undocumented Latinx young adults); Cecilia Menjivar, *Educational Hopes, Documented Dreams: Guatemalan and Salvadoran Immigrants' Legality and Educational Prospects*, 620 *ANNALS AM. ACAD. POL. & SOC. SCI.* 177 (2008) (focusing on the effects that an “ambivalent legal status” has on Guatemalan and Salvadoran immigrants' experience with the education system in the United States).

13. See ALICE BLOCH, NANDO SIGONA & ROGER ZETTER, *SANS PAPIERS: THE SOCIAL AND ECONOMIC LIVES OF YOUNG UNDOCUMENTED MIGRANTS* (2014) (exploring the lived experiences of various undocumented migrant groups in the United Kingdom in the context of the theoretical and policy debates surrounding undocumented migration).

14. See, e.g., *Obtaining Asylum in the United States*, *supra* note 4 (differentiating the process for affirmative versus defensive asylum claims, where defensive claims deal with immigration courts and affirmative claims only work with U.S. Citizenship and Immigration Services).

15. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in Traffic Court*, CNN (June 26, 2014), <https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system> [<https://perma.cc/KK3P-SSFS>].

16. According to data from Transactional Records Access Clearinghouse (TRAC), from January 2001 to February 2023, immigration courts across the country made 712,480 decisions in affirmative and defensive asylum cases and granted asylum or other relief in 303,203 cases, just under 43%. *Asylum Decisions*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/asylum/> [<https://perma.cc/5HNN-PSGN>].

considerably by judge<sup>17</sup> and location;<sup>18</sup> and the overlap between civil law and functional trappings of criminal law is thrown into particularly stark relief. Courtrooms—in both the cultural imagination and, to an extent, legal reality—imbue proceedings with adversarial friction. What happens in front of a judge carries a sense of urgency that does not necessarily come through in “non-adversarial”<sup>19</sup> interviews with administrators in drab government buildings.

Yet most asylum claims are not heard in courtrooms, and, arguably, courtrooms are not where much of the damage can be done to claimants. The bureaucratic part of the system that takes place before a claimant is ever in front of an Immigration Judge is where “slow violence” is perpetrated against asylum seekers.<sup>20</sup> This “attritional,” violence happens “gradually and out of sight” and is “typically not viewed as violence at all.”<sup>21</sup>

Administrative decisions affect a greater number of affirmative asylum applicants<sup>22</sup> than those made by Immigration Judges. For example, in fiscal year (FY) 2018, facing a backlog of more than 300,000 claims, monthly workflow reports published by the United States Citizenship and Immigration Services (USCIS) indicate that Asylum Officers adjudicated 69,189 affirmative asylum claims.<sup>23</sup> Asylum Officers granted 30% of these claims, and a further 31% were refused, found to be ineligible for consideration, withdrawn or otherwise discontinued.<sup>24</sup> The remaining 39% of claims were referred for consideration by an

17. For example, as of October 2022, denial rates in Houston vary by judge from 79.7% (Bao Nguyen & Joshua Osborn, JJ.) to 100% (Bruce Imbacuan, J.); rates in San Francisco vary from 1.0% (Paul Defonzo, J.) to 95.1% (Anthony Murry, J.). *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022*, TRAC IMMIGR. (Oct. 26, 2022), <https://trac.syr.edu/immigration/reports/judge2022/> [<https://perma.cc/4QWX-56KD>].

18. From January 2001 through April 2022, asylum applicants were granted some form of relief, on average, 70% of the time in New York City, 60% of the time in San Francisco, 12% of the time in Houston, and 11% in Atlanta. Drever & Blue, *supra* note 11.

19. U.S. CITIZENSHIP & IMMIGR. SERVS., RAI0 DIRECTORATE – OFFICER TRAINING: INTERVIEWING – INTRODUCTION TO THE NON-ADVERSARIAL INTERVIEW 3 (2019).

20. ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (2013); Lucy Mayblin, Mustafa Wake & Mohsen Kazemi, *Necropolitics and the Slow Violence of the Everyday: Asylum Seeker Welfare in the Postcolonial Present*, 54 SOCIO. 107, 111 (2020).

21. Mayblin et al., *supra* note 20 (internal quotations omitted) (citing Thom Davies & Arshad Isakjee, *Ruins of Empire: Refugees, Race and the Postcolonial Geographies of European Migrant Camps*, 102 GEOFORUM 214, 214 (2019)).

22. Data provided herein refers to primary applicants. Each application may have multiple dependents.

23. Author analyzed data from March to September 2019 as provided by USCIS in U.S. CITIZENSHIP & IMMIGR. SERVS., ASYLUM OFFICE WORKLOAD (Sept. 2019), <https://www.uscis.gov/sites/default/files/document/data/PEDAffirmativeAsylumStatisticsFY2019.pdf> [<https://perma.cc/694W-MB9S>].

24. *Id.*



Immigration Judge.<sup>25</sup> In that same year, Immigration Judges decided 6,007 affirmative cases, about 8.5% as many as USCIS.<sup>26</sup> Even the full court caseload of 42,000 affirmative and defensive cases still only amounts to 60% as many cases as are decided by USCIS.<sup>27</sup>

The second quarter of FY 2019 data published by USCIS no longer provided as much detail about affirmative asylum processing.<sup>28</sup> This new format shows only asylum approvals and denials.<sup>29</sup> In FY 2019 USCIS completed 78,600 asylum applications,<sup>30</sup> approved 19,945 applications, and denied 630 applications.<sup>31</sup> While no specific data are given regarding the number referred to Immigration Judges, historical trends suggest that a significant percentage, if not all of 58,025 completed cases were referred to Immigration Judges. In 2019, Immigration Judges heard 8,208 affirmative cases, or just under 10.5% as many as USCIS.<sup>32</sup> The backlog of asylum applications at the end of FY 2019 was listed as 325,514.<sup>33</sup> Data from 2020 and later are heavily affected by the COVID-19 pandemic and enforcement of Title 42,<sup>34</sup> which prevents many individuals from filing affirmative claims.<sup>35</sup>

These data reveal that the asylum office also has a gate-keeping function, deciding whose claims will be granted, whose will be rejected, and who will have another chance in front of a judge. Cases that are not referred but are otherwise rejected by USCIS cannot be appealed.<sup>36</sup> A

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25. *Id.*

26. *Id.*

27. *See Asylum Decisions, supra* note 16.

28. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF SERVICE WIDE FORMS FISCAL YEAR TO DATE, BY QUARTER, AND FORM STATUS FISCAL YEAR 2019 (2020), [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2019Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2019Q4.pdf) [<https://perma.cc/MH55-WDLB>].

29. A caveat reads “[a]lthough this report includes approvals and denials, it does not include referrals to an Immigration Judge which comprise a large portion of the workload for asylum applications. Further, forms received, approved, denied, and pending counts will differ from counts reported in previous quarters due to processing delays and the time at which the data are queried.” *Id.*

30. U.S. CITIZENSHIP & IMMIGR. SERVS., 2020 USCIS STATISTICAL ANNUAL REPORT: FY 2016-2020, at 20 (2021).

31. *Asylum Decisions, supra* note 16.

32. *Id.*

33. *Id.*

34. 42 U.S.C. § 265.

35. 2020 STATISTICAL ANNUAL REPORT, *supra* note 30, at 9–10 (“The reduced number of affirmative asylum applications filed may be due in part to travel restrictions and the COVID-19 pandemic. Affirmative asylum completions were impacted in FY 2020 due to COVID-19 and social distancing guidelines. To protect USCIS employees and immigration benefit applicants, all of the USCIS field and asylum offices were closed to the public from March 18 through June 3, 2020.”).

36. *See Types of Affirmative Asylum Decisions: Final Denial*, U.S. CITIZENSHIP & IMMIGR.

claimant can file a motion requesting their file be reopened or reconsidered, but this request is discretionary.<sup>37</sup> The test for reconsideration is misapplication of law or policy, and for a case to be reopened, a claimant must show new facts.<sup>38</sup> Denied requests cannot be appealed, though further requests can be made for discretionary reconsideration.<sup>39</sup>

As for the narration of asylum claims, we know that applicants' stories are shaped by the social and political context in which they are created and considered.<sup>40</sup> The narratives that fit comfortably into the articulated legal categories of persecution<sup>41</sup> will have to do less cultural work.<sup>42</sup> This sentiment is particularly true if the content of the claimant's struggle is well-documented publicly, such as being a combatant in a recognized conflict zone; a vocal participant in political situations; or

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SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/types-of-affirmative-asylum-decisions> [<https://perma.cc/DQ4W-ZXZU>] (May 31, 2022) (stating that you cannot appeal an Asylum Officer's final decision to deny an affirmative asylum application).

37. See Reopening or reconsideration, 8 C.F.R. § 103.5(a) (2022).

38. *Id.* § 103.5(a)(2)–(3).

39. See *id.* § 103.5(a)(6); *Types of Affirmative Asylum Decisions: Final Denial*, *supra* note 36.

40. See Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 LAW & SOC. INQUIRY 63 (2001) (analyzing the “notions of political subjectivity” that have played a role in Salvadoran immigrants' efforts to obtain political asylum or other legal status in the United States); Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 75 (2016) (examining the challenges faced by trauma survivors seeking asylum and how lawyers, in drafting declarations, may inadvertently increase the likelihood of an adverse decision).

41. As noted above, the legal categories are experience of or “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” I-589 INSTRUCTIONS, *supra* note 4, at 3.

42. See, e.g., Shuki J. Cohen, *Measurement of Negativity Bias in Personal Narratives Using Corpus-Based Emotion Dictionaries*, 40 J. PSYCHOLINGUISTIC RSCH. 119 (2011) (measuring negativity bias using “positive and negative dictionaries of emotion words” in the context of autobiographical narratives); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action*, 14 VA. J. SOC. POL'Y & L. 119 (2006) (discussing prevalent opposition to asylum based on gendered violence because of a fear of skyrocketing asylum claims and how such a fear is unfounded); Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637 (2006) (discussing how unreliable credibility evidence, the REAL ID Act of 2005's instruction for judges to assess applicants' “demeanor and candor,” and highly deferential appellate review works against women seeking asylum); Sara L. McKinnon, *Citizenship and the Performance of Credibility: Audiencing Gender-Based Asylum Seekers in U.S. Immigration Courts*, 29 TEXT & PERFORMANCE Q. 205 (2009) (discussing how judges evaluate applicants' credibility performances in the context of women seeking asylum due to gendered violence, and arguing that positive outcomes are increasingly contingent on the performance of conventions, such as good speech and narrative rationality).

having scars, injuries, and other relevant diagnoses.<sup>43</sup> These struggles can often be given more importance than existing legal documentation,<sup>44</sup> such as other similarly-constructed asylum claims. Narratives that fall outside the established body of law must do more evidentiary and communicative work, and they must produce more corroborating documents or witnesses to “sell” their suffering,<sup>45</sup> especially where asylum narratives are based in experiences of torture.<sup>46</sup>

## II. Meaning Making and Institutional Asylum Governance

Since the asylum system began, it has been consistently imbued with meaning, drawn externally (from political and cultural forces) and internally (by the legal and institutional frameworks for processing and evaluating claims). It is this interaction between endogenous and exogenous forces that allows the modern asylum system to emerge as a tool for institutional asylum governance. Providing insight into the forces that shape and limit the way that asylum stories can be told, I develop a theory of how categories are assigned meaning in asylum processes. I draw on institutional theory to show how law, culture, and institutions shape and are shaped by the way asylum seekers communicate about their experiences, and I use empirical data to show how this is evidenced through the ways affirmative asylum claims are narrated over time.

### A. Institutional Logics and Practices

The desire to tie adjudication to a seemingly stable legal test is a reflection of both a material practice and a symbolic construction that provides an organizational governing principle: the desire to determine

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43. See, e.g., Didier Fassin & Estelle D'Halluin, *The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers*, 107 AM. ANTHROPOLOGIST 597 (2005) (discussing how asylum seekers in France are increasingly subject to examinations of their physical and psychological traumas, in addition to their autobiographical narratives, leading to medical authorities taking precedence over asylum seekers' words); Didier Fassin & Carolina Kobelinsky, *How Asylum Claims Are Adjudicated: The Institution as a Moral Agent*, 53 REVUE FRANÇAISE DE SOCIOLOGIE 657 (2012) (examining how, in France, “changes in the moral economy of asylum and a shift from trust to suspicion are reflected in the local justice practices founded on the principles of independence and the fairness of the institution”).

44. See, e.g., Coutin, *supra* note 40, at 80–88 (describing the narratives presented to U.S. asylum officials of violence suffered by successful, and unsuccessful, Salvadorans and Guatemalans seeking political asylum).

45. E.g., Miriam Ticktin, *Selling Suffering in the Courtroom and Marketplace: An Analysis of the Autobiography of Kiranjit Ahluwalia*, 22 POL. & LEGAL ANTHROPOLOGY REV., May 1999, at 24, 33–37.

46. See Tobias Kelly, *Sympathy, and Suspicion: Torture, Asylum, and Humanity*, 18 J. ROYAL ANTHROPOLOGICAL INST. 753 (2012) (discussing the assessment of claims of torture in the context of the British asylum process).

who is desirable and to exclude from eligibility anyone who is not.<sup>47</sup> Evaluating narratives is central to the material work done by Asylum Officers and, therefore, to asylum eligibility. However, this process of narration—both what is expected and what is produced—is not only shaped by law and institutional policy. Culture shapes the institutional goals that arise from a focus on narrating persecution in ways that appease legal and political goals and definitions. Institutional goals do not arise in a vacuum. Legal and political notions such as desirability, worth, risk, and harm inform the way that decision-making proceeds at the organizational and individual level. Those seeking asylum then, must employ “strategies of action” informed by their perception of not just what is legally required but what is culturally expected.<sup>48</sup>

Narrative markers privileged by asylum adjudication—such as credibility, consistency, and conceptual notions like plausibility—are imperfect and subjective.<sup>49</sup> A highly discretionary process like asylum decision-making is subject to political and cultural influence. In this context, publicly available meanings facilitate patterns of action,<sup>50</sup> and culture is especially likely to fill in spaces where organizations do not provide clear guidance on what is considered “rational” or “legitimate.”<sup>51</sup> Asylum Officers will, like all of us, fall back on culture when they need to make decisions and the best course of action is unclear. As asylum

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47. See Roger Friedland & Robert Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 232 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (describing institutional orders, transformations, contradictions, and logic as contributing to a symbolic construction from which Western societies structure themselves).

48. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 *AM. SOCIO. REV.* 273, 278, 281 (1986) (postulating that culture is a “tool kit” that one draws upon to define their “strategies of action”); JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 40–46 (1989) (describing how “clusters of beliefs and norms that characterize political institutions are formed and change” and that individuals will see what they want to see); RICHARD W. SCOTT & JOHN W. MEYER, *INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS: STRUCTURAL COMPLEXITY AND INDIVIDUALISM* 68 (Diane S. Foster ed., 1994) (“Institutions are symbolic and behavioral systems containing representational, constitutive, and normative rules together with regulatory mechanisms that define a common meaning system and give rise to distinctive actors and action routines.”); JOSEPH R. GUSFIELD, *THE CULTURE OF PUBLIC PROBLEMS* 40 (1981) (“The character of perception and conceptualization inherent in the symbolic categories we utilize deeply influences our experience of reality and our actions.”).

49. See, e.g., 8 U.S.C. § 1158(b)(1)(B)(iii) (explaining that a trier of fact may base credibility determinations on “the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account,” and “the consistency between the applicant’s or witness’s written and oral statements,” among other things).

50. Swidler, *supra* note 48, at 283.

51. John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *AM. J. SOCIO.* 340, 345 (1977) (explaining that organizations must incorporate the societal landscape in order to be perceived as legitimate).

claimants cannot expect those determining their claims to have access to the cultural information relevant to understanding the reality in which they lived and made decisions, they must instead turn to modes of shared understanding.

Credibility is a necessary, albeit not sufficient, part of the asylum decision-making calculus. Not only does it give shape to decision-makers' discretion, but it informs the extent to which other legal remedies may be available. An asylum seeker who files their petition more than twelve months after arriving in the country may seek a waiver,<sup>52</sup> for example, whereas an asylum seeker facing an adverse credibility determination may only take their chances in front of a judge.<sup>53</sup>

Like all qualitative bases of exclusion or removal in the United States, credibility works in concert with those more fixed legal levers, including: filing an application completely and on-time;<sup>54</sup> ensuring there is no non-political criminal history;<sup>55</sup> and avoiding previous unlawful presence bars,<sup>56</sup> evidence of asylum claims elsewhere, or passage through so-called "safe third countries"<sup>57</sup> that would preclude asylum eligibility. While credibility is a piece of the larger puzzle, it also informs the evaluation of each piece.

### *B. Credibility in Theory and Practice*

Narrative construction is the product of a dialectic of *system* and *practice*.<sup>58</sup> Asylum seekers employ available symbols in the practice of narrating their lives to achieve a particular goal: to be recognized as credible and granted refugee status. Those successful narratives or narrative elements are then reproduced by other claimants until the symbols and the practice are entirely and necessarily mutually reinforcing.<sup>59</sup> The symbols, and the practice of reproducing them, are mutually reliant on one another to be sustained and transformed, just as the asylum narratives and the asylum system become similarly interdependent.

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52. 5. *The One-Year Filing Deadline*, IMMIGR. EQUAL.: ASYLUM MANUAL, <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-the-one-year-filing-deadline/> [<https://perma.cc/K9WD-S453>]; 8 U.S.C. § 1158 (a)(2)(D).

53. *See* 8 U.S.C. § 1158 (b)(1)(B)(iii).

54. *Id.* § 1158(a)(2)(B).

55. *See id.* § 1158(b)(2)(A).

56. *See id.* § 1182(a)(9)(B).

57. *See id.* § 1158(a)(2)(A), (C).

58. *Cf.* William H. Sewell, *Concepts of Culture*, in BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE 47, 52 (Lynn Hunt & Victoria Bonnell eds., 1999) (describing culture as a dialectic of system and practice).

59. *See id.* at 47.

Neo-institutional theorists provide a helpful basis for understanding the complex ways in which law becomes culturally and structurally embedded in organizations like USCIS.<sup>60</sup> Scholars exploring the symbolic and strategic effect of the law in an institutional or organizational setting have pointed to the intersection of culture and institutions,<sup>61</sup> identifying the “mutually constitutive relation between material practices and symbolic constructions.”<sup>62</sup> As such, legal change and organizational change are mutually constitutive.<sup>63</sup>

Governmental organizations, such as those that shape the asylum system, are active in formulating policy and deciding how it will be implemented.<sup>64</sup> Their ability to shape law and policy directs the allocation of resources and power to those schemas that best align with the cultural worldview and strategies of action that they support.<sup>65</sup> Governmental organizations are then able to claim institutional practices that discursively align with public preferences and beliefs—and in turn exercise their power to reinforce those views. The symbolic and strategic

60. See SCOTT & MEYER, *supra* note 48, at 12; Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOCIO. 479, 495–99 (1997) (explaining the culturalist perspective as it relates to symbolic constructions, materialist perspective, and the impact of the law and culture on organizational settings); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 83, 83–88 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (explaining how neo-institutional theory has impacted organization theory).

61. Calvin Morrill, *Culture and Organization Theory*, 619 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 28–29 (2008).

62. John W. Mohr & Vincent Duquenne, *The Duality of Culture and Practice: Poverty Relief in New York City, 1888–1917*, 26 THEORY & SOC’Y 305, 306 (1997); see also Meyer & Rowan, *supra* note 51 (arguing that the structure of organizations reflects socially constructed reality).

63. See Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOCIO. 1401, 1402 (1990) (“[L]aw and the legal environment foster change in organizational governance.”); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOCIO. 1531, 1535 (1992) (explaining that the law, in combination with societal norms and culture associated with the law, creates a “legal environment” which impacts organizational change); Meyer & Rowan, *supra* note 51, at 347–50.

64. Meyer & Rowan, *supra* note 51, at 351 (“[G]overnmental agencies remain committed to these organizations, funding and using [schools and hospitals] almost automatically year after year.”); see also Donileen R. Loseke, *The Study of Identity as Cultural, Institutional, Organizational, and Personal Narratives: Theoretical and Empirical Integrations*, 48 SOCIO. Q. 661, 668–69 (2007).

65. Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, HASTINGS L.J. 861, 884 (1991) (citing Harlan Hahn, *Public Policy and Disabled Infants: A Sociopolitical Perspective*, 3 ISSUES L. & MED. 3, 14–15 (1987)) (“[P]ublic policy is a reflection of pervasive and dominant preferences, attitudes, and values.”); Edelman & Suchman, *supra* note 60, at 503; Morrill, *supra* note 61, at 15, 32 (finding that “these cultural schemas influenced the allocation of opportunity and compensation in the financial services field, placing women in disadvantaged positions”); see also Loseke, *supra* note 64, at 668–69.

effect of law in governmental settings highlights the extent to which culture shapes and informs these institutions.<sup>66</sup>

To be found credible in the affirmative asylum process, claimants must present accounts that detail their specific life history and reflect broader cultural and legal metanarratives. Research on effective narratives points to the necessity of an identifiable plot with recognizable characters;<sup>67</sup> a clear connection between events over time;<sup>68</sup> an obvious allusion to a meaning or a “moral;”<sup>69</sup> and expectations around how narrators display situation-appropriate levels of reason, emotion, and self-evaluation.<sup>70</sup> These factors are central to our ability to perceive stories as legible and judge them credible.<sup>71</sup>

For most claimants, crafting a legible and credible narrative will mean balancing the need to meet legal tests about persecution, while also tapping into cultural stereotypes and assumptions about important factors such as poverty, agency, and desirability. This narrative building is not unique to asylum, of course. We all build our own narratives out of the stories that surround us in dynamic and fluid ways.<sup>72</sup> Stories also follow narrative rules, both structural and epistemological, which vary depending on context, power, and place.<sup>73</sup> A story told in church is not the same as one told to a newspaper reporter, which is not the same as one told to a judge. We need other people’s stories to know which elements of our own stories are important, to provide a basis for change or comparison, and to assist in judgments of truth, relatability, and

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66. See Meyer & Rowan, *supra* note 51.

67. Loseke, *supra* note 64, at 665.

68. William Labov & Joshua Waletzky, *Narrative Analysis: Oral Versions of Personal Experience*, in *ESSAYS ON THE VERBAL AND VISUAL ARTS 12* (June Helm ed., 1967) (using real-life examples of stories told by individuals to analyze and conclude the characteristics of an effective narrative).

69. Loseke, *supra* note 64, at 675; Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 *AM. J. SOCIO.* 1328, 1341 (2003).

70. See CATHERINE RIESSMAN, *NARRATIVE ANALYSIS* (Judith L. Hunter ed., 1993).

71. See Labov & Waletzky, *supra* note 68; Ewick & Silbey, *supra* note 69, at 1351 (explaining that drawing upon one’s cultural and social experience increases the likelihood that their story will be accepted by the audience as genuine); see also Francesca Polletta, Pang Ching Bobby Chen, Beth Gharrity Gardner & Alice Motes, *The Sociology of Storytelling*, 37 *ANN. REV. SOCIO.* 109 (2011) (describing which elements of narratives increase and decrease credibility).

72. Ewick & Silbey, *supra* note 69, at 1343.

73. See, e.g., FRANCESCA POLLETTA, *IT WAS LIKE A FEVER: STORYTELLING IN PROTEST AND POLITICS 2–3* (2006) (discussing the different forms storytelling must take given the context in which they are told); W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (Quid Pro Books 2014) (1981) (discussing the impact of narratives on jurors in the courtroom).

meaning.<sup>74</sup> Owing to the law's unique relationship to precedent, I argue that legal stories are particularly reliant on a stock of existing, effective templates. Both the law itself and other legal stories become a resource from which to draw when individuals construct and characterize social meanings, identities, and actions.<sup>75</sup> Through the telling and retelling of these stories, we not only entrench the canonical status of some, but we also reinforce normative messages and conclusions.<sup>76</sup> For asylum seekers, all these rules, conventions, and styles become additional barriers to communicating their experiences.

To be found credible, asylum seekers are required to meet not only a range of legal tests, but also key cultural tests of legibility and deservingness. Accessing and making use of these cultural tools requires translating asylum seekers' experiences—many of which are distant from those of the decision-maker—into tangible, intelligible forms of private, subjective harm, and legal, objective persecution. The impact and efficacy of asylum seekers' stories hinges on their ability to build a knowable, plausible "world" and to direct the decision-maker towards a shared interpersonal reality in which the asylum seeker is credible and worthy of protection.<sup>77</sup>

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74. See James P. Leary, *White Guys' Stories of the Night Street*, 14 J. FOLKLORE INST. 59 (1977) (describing how a subculture, including language and ways of storytelling, developed based on other members of the subculture).

75. Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC. REV. 11 (2005) (describing how in the field of employment, workers learning about the law helps workers construct their story and case, and motivates them to bring claims against their employers); Loseke, *supra* note 69, at 673–75 (describing how people use their understandings of formula stories to evaluate their own experiences and constructive narrative identities); KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 99–108 (Johns Hopkins Univ. Press ed., 1988) (describing how victims of discrimination feel when their rights have been violated and how their perception of the law impacts the actions they take to preserve their rights); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. SCH. L. REV. 123, 157–162 (1992) (describing the impact of using a legal perspective in cases of domestic violence and rape); POLLETTA, *supra* note 70, at 164–65 (explaining that Mexico's ruling party used Emilio Zapata's assassination as an ideological resource, allowing activists fifty years later to attack the government for betraying his legacy). *But see* Scheppele, *supra*, at 12 (explaining that lawyers also use "ordinary storytelling" to characterize actions).

76. See POLLETTA, *supra* note 70, at 14.

77. Talia Shiff, *Reconfiguring the Deserving Refugee: Cultural Categories of Worth and the Making of Refugee Policy*, 54 LAW & SOC. REV. 102, 115–17 (2020) (providing a brief history of who was deemed worthy of protection in U.S. history).



### III. Narrative and Credibility in Law, Politics, and Practice: A Historical Framework

Asylum is still a relatively young legal concept, introduced in what would eventually become its contemporary legal form in the early 1950s.<sup>78</sup> As a matter of explicit law and policy, asylum has only been institutionally formalized in the United States since the 1980s.<sup>79</sup> In this Part, I discuss the broader social, political, and cultural landscape in which the asylum system was developed from World War II (WWII) to the present. This part is not an exhaustive history of the legislative or political history of the asylum system,<sup>80</sup> rather it is a framework for considering the evolution of the role of narratives and narrative credibility. There are many approaches one could take to develop such a framework. The one offered below is informed by this Article's main analytic goal: to foster an understanding of the way credibility facilitates the institutionalization of changing cultural norms by combining a *top-down* institutional analysis with *bottom-up* empirical data from asylum claims.

Situating the evolution of asylum in historical context is important because it contextualizes legal and administrative shifts in a discussion of relevant social, political, and cultural changes over time. In many ways, the historical narrative is a top-down story about how powerful actors in law and politics use credibility as a tool of asylum governance and create organizational structures, incentives, and processes that align with and further those actors' ideological or organizational goals.

While the United States developed considerable law and policy around controlling, limiting, and excluding migrant populations in the early 20<sup>th</sup> century, the country did little to acknowledge or regulate immigration specifically for humanitarian reasons.<sup>81</sup> The few relevant provisions that were developed at that time favored protection of religious minorities and excluded those fleeing political persecution because of fears of importing radical ideological views.<sup>82</sup> In practical

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78. See sources cited *infra* notes 85–89 and accompanying text.

79. See discussion *infra* Section III.A.i.

80. See, e.g., MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 167–201, 227–64 (1st ed. 2004); ARISTIDE ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 243–336 (2006); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (discussing how contrary to popular belief, the United States did not welcome immigrants with open arms); JEFFREYS. KAHN, *ISLANDS OF SOVEREIGNTY: HAITIAN MIGRATION AND THE BORDERS OF EMPIRE* (2019) (detailing the path toward asylum in the United States for Haitian migrants at sea).

81. See MATTHEW E. PRICE, *RETHINKING ASYLUM: HISTORY, PURPOSE, AND LIMITS* 54–55 (2009); *Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline> [<https://perma.cc/TK2Z-FRZJ>].

82. See STEPHEN H. LEGOMSKY, *Refugees, Asylum and the Rule of Law in the USA*, in

terms, humanitarian policies developed in this era relied heavily on temporary grants of what is known as humanitarian “parole,” a discretionary status that does not provide a path to permanent residency.<sup>83</sup>

In the run-up to WWII, faced with mounting evidence of the persecution of European Jewish communities in particular, both public opinion and public policy opposed formalizing a process for recognizing those in need of admission to the United States for humanitarian reasons.<sup>84</sup> However, in 1951, much of the world sought to create an international framework that could help prevent some of the human rights violations that occurred during the war.<sup>85</sup> The Geneva Convention on the Status of Refugees established the fundamental tenets for international and, eventually, domestic refugee and asylum law and policy.<sup>86</sup> The protections in the 1951 Convention formed, and continue to form, the bedrock of individual countries’ domestic asylum frameworks.<sup>87</sup> The Convention affords protection to those who cannot safely return to their country of origin or last habitual residence because of a well-founded fear of persecution in that country.<sup>88</sup> Such persecution must be *on account* of one of the enumerated protected grounds: race, nationality, religion, political opinion, or membership in a “particular

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REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES 122, 124 (Susan Kneebone ed., 2009) (citations omitted) (describing how political persecution was excluded as a grounds for asylum in the early 1930s); PRICE, *supra* note 81, at 54–55 (referring to the Immigration Act of 1917, in which Congress exempted those fleeing religious persecution from a literacy test requirement but did not exempt those fleeing political persecution, as “lawmakers feared that the beneficiaries of such an exemption would be radicals”).

83. See *Parole of Hungarians (1956-57), Cubans (1959-62), Chinese (1962)*, IMMIGR. HISTORY, <https://immigrationhistory.org/item/parole-of-hungarians-1956-cubans-1960-chinese-1962/> [<https://perma.cc/BE88-SHAJ>] (describing how parole was used to temporarily admit refugees during the 1950s and 60s); Anita Casavantes Bradford, “*With the Utmost Practical Speed*”: Eisenhower, Hungarian Parolees, and the “Hidden Hand” Behind US Immigration and Refugee Policy, 1956–1957, 39 J. AM. ETHIC HISTORY, Winter 2020, at 5 (discussing how President Eisenhower used parole—authorized under Section 212(d)(5) of the Immigration and Nationality Act of 1952—to admit 38,000 refugees from December 1956 to May 1957); see also *White House Statement Concerning the Admission of Additional Hungarian Refugees*, THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/white-house-statement-concerning-the-admission-additional-hungarian-refugees> [<https://perma.cc/6D4W-9APU>] (announcing President Eisenhower’s intent to use parole to admit refugees).

84. LEGOMSKY, *supra* note 82, at 124 (“[A]s late as April 1939, some 83 per cent of the American people were opposed to admitting Jewish refugees.”); see also SAUL S. FRIEDMAN, NO HAVEN FOR THE OPPRESSED: UNITED STATES POLICY TOWARD JEWISH REFUGEES, 1938-1945, at 31 (2017).

85. See U.N. REFUGEE AGENCY, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2 (2010), <https://www.unhcr.org/media/28185> [<https://perma.cc/5MRA-DA8W>].

86. *Id.* at 5.

87. *Id.* at 4–5.

88. *Id.*

social group.”<sup>89</sup> However, the United States never ratified the Convention.<sup>90</sup>

Over the next two decades, the United States passed a series of temporary and geographically-specific measures designed to protect particular refugee populations, specifically those displaced by WWII in Europe and Asia.<sup>91</sup> Despite ratifying the 1967 Protocol (which expanded the Refugee Convention’s scope to all parts of the world),<sup>92</sup> the United States, driven by Cold War politics, still focused its protection efforts on those fleeing communism.<sup>93</sup> As such, the United States facilitated only ad hoc conditional entry, and it failed to pass legislation containing *non-refoulement* provisions<sup>94</sup> or pathways to permanent residence for refugees.<sup>95</sup>

### A. Formalizing Institutional Responses

#### i. Inconsistent Application of Screening Architecture

While the 1970s did give rise to the early legal and administrative asylum “screening architecture”—concepts, procedures, statutes, and guidance documents that laid the groundwork for the complex system now in place—they were not applied consistently in all places or for all claimants.<sup>96</sup> Formal procedures for claiming asylum were introduced into domestic law with passage of the 1980 Refugee Act.<sup>97</sup> However, such legislation made little material difference when it came to processing claims. A December 1982 internal report by the Immigration and Naturalization Service (INS) suggested that despite the Act’s provisions,

89. *Id.* at 14.

90. See LEGOMSKY, *supra* note 82, at 124 (citation omitted).

91. See, e.g., *id.* (describing a 1965 statute which allowed 6% of immigrant visas to be awarded to those fleeing “persecution in either a ‘communist-dominated’ country or a country in the Middle East”); *Refugee Timeline*, *supra* note 81 (summarizing the “ad hoc programs” designed to admit refugees during this time).

92. See G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Dec. 16, 1966).

93. See, e.g., Rebecca Hamlin, *Ideology, International Law, and the INS: The Development of American Asylum Politics 1948–Present*, 47 POLITY 320, 322–24 (2015); LEGOMSKY, *supra* note 82, at 124–25; GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT* (2d ed. 1998) (discussing the development of U.S. refugee policy after WWII and how the Cold War deeply influenced this development); Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT’L J. REFUGEE L. 455, 457–58 (1992).

94. “Non-refoulement” is a core legal principle in international humanitarian protection which prohibits the expulsion of a person to a county or territory where their “lives or freedom may be threatened.” Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT’L L. 897, 902–03 (1985).

95. See *Refugee Timeline*, *supra* note 81 (summarizing the “ad hoc programs” designed to admit refugees and lack of permanent pathways to residence).

96. See KAHN, *supra* note 80, at 135–84.

97. Refugee Act of 1980, Pub. L. No. 96-102, 94 Stat. 102.

“few guidelines” existed for making decisions.<sup>98</sup> One study found that “[n]o consistent application or coherent view of legal doctrine governed the outcome of these decisions; many of the cases granted were approved on the basis of theories rejected in other cases in which asylum was denied.”<sup>99</sup>

Even at this relatively early stage in the emergence of an institutional framework for deciding asylum claims, both the centrality of credibility determinations and their vulnerability to political interference were recognized. David Martin, an architect of the 1980 Refugee Act, acknowledged that asylum decision-making rested on “uniquely elusive grounds” and “revolve[d] critically around a determination of an applicant’s credibility,” noting that it was likely that “political considerations” would intrude on decision-making.<sup>100</sup>

In this same period, government and private sector-driven American imperialism around the world was laying the groundwork for mass displacement. In particular, anti-democratic political and economic interventions across Latin America,<sup>101</sup> support for the oppressive regime of “Papa Doc” Duvalier in Haiti,<sup>102</sup> and intervention in the Vietnam War led to the displacement of hundreds of thousands of people.<sup>103</sup> A significant majority of these displaced people would eventually seek to resettle in the United States.<sup>104</sup> Pressure on the new system ballooned instantly. By 1983, there was a backlog of more than 170,000 cases—mostly Cubans, Central Americans, Haitians, and Iranians.<sup>105</sup> As the asylum framework emerged, it became a vector for expressing political power and ideology. The adjudicative framework was not just susceptible to, but designed to be infused with, the politics of the contemporaneous

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98. See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 437 n.8 (1992) (citing IMMIGR. & NATURALIZATION SERV., ASYLUM ADJUDICATION: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE (1982) (internal INS study)).

99. *Id.* at 452.

100. David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 3 MICH. J. INT’L L. 91, 115 (1982).

101. NOAM CHOMSKY, TURNING THE TIDE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE STRUGGLE FOR PEACE 96–110 (1985); Marc Edelman & Andrés León, *Cycles of Land Grabbing in Central America: An Argument for History and a Case Study in the Bajo Aguán, Honduras*, 34 THIRD WORLD Q. 1697, 1701 (2013).

102. See Gilbert Loescher & John Scanlan, *Human Rights, U.S. Foreign Policy, and Haitian Refugees*, 26 J. INTERAM. STUD. WORLD AFFS. 313 (1984).

103. CHOMSKY, *supra* note 101, at 306.

104. ZOLBERG, *supra* note 80, at 347.

105. Peter Grier, *‘Yearning to Breathe Free,’ Thousands Seek, Few Get Asylum in US*, THE CHRISTIAN SCI. MONITOR (Oct. 13, 1983), <https://www.csmonitor.com/1983/1013/101317.html> [<https://perma.cc/CX8J-ASGD>].

political regime.<sup>106</sup> Both individual asylum seekers and the entire system suffered under this prioritization of anti-communist sentiment over human rights.<sup>107</sup>

ii. The Rise of Rule-Based Standards

As the system shifted away from the ideological coherence that had driven a focus on communism during the previous three decades, the 1990s brought drastic changes to the asylum processing system. In 1990, a so-called “final rule” created specially-trained Asylum Officers and formalized the application procedures largely still in effect today.<sup>108</sup> The system created two paths for claiming asylum: (1) affirmatively, wherein individuals seek asylum before they are involved in any other immigration proceedings, or (2) defensively, wherein they raise an asylum claim in response to removal.<sup>109</sup>

Attempts to formalize and improve fairness led to standard claim-processing guidelines. A series of memos and interim rules allowed an asylum processing system to take shape legally and organizationally.<sup>110</sup> The affirmative procedures required an individual to submit a written application, called an I-589, and allowed, though did not require, them to provide various supporting documents to corroborate their claim.<sup>111</sup> Generally, they also needed to submit to at least one in-person interview with an Asylum Officer.<sup>112</sup>

Applicants were, and still are, permitted to be represented by legal counsel at this stage of the asylum process, but not in an advocacy capacity.<sup>113</sup> During the entire process, claimants bore the legal burden of

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106. See Loescher & Scanlan, *supra* note 102.

107. See, e.g., Loescher & Scanlan, *supra* note 102 (describing the violation of the human rights of Haitian refugees in this era).

108. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, 253) [hereinafter *Asylum and Withholding of Deportation*]; Beyer, *supra* note 93.

109. See *Asylum and Withholding of Deportation*, *supra* note 108.

110. See, e.g., Press Release, U.S. Dep’t of Just., Asylum Reform: Five Years Later: Backlog Reduced and Number of Non-Meritorious Claims Drops (Feb. 1, 2000), <https://www.uscis.gov/sites/default/files/document/news/Asylum.pdf> [<https://perma.cc/G5W6-6TZ2>].

111. See U.S. CITIZENSHIP & IMMIGR. SERVS., I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2022) <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf> [<https://perma.cc/JFP4-WSFV>].

112. I-589 INSTRUCTIONS, *supra* note 4.

113. 8 C.F.R. § 292.1 (2022). In fact, lawyers play more of an observational role, generally asking questions if there are areas of the claim the Asylum Officer did not address or referring to submitted evidence. See, e.g., NAT’L IMMIGR. JUST. CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 39 (2016). They may also make a short closing statement. See, e.g., *id.* at 38.

establishing asylum eligibility.<sup>114</sup> They could qualify based on past persecution *or* a well-founded fear of future persecution on account of a protected ground.<sup>115</sup> Additionally, individuals had to demonstrate how an objective basis for their fear intersected with their own subjective experience or fear of harm—a concept referred to as “nexus.”<sup>116</sup> Finally, their cases needed to warrant a favorable exercise of discretion,<sup>117</sup> and meet a “reasonable possibility” standard.<sup>118</sup> The Asylum Officer had to believe it was reasonably possible that a claimant experienced the persecution they claimed or would experience such persecution in the future.

While there is no articulated guidance for evaluating asylum claims in the published policy documents of the time, internal documents shed perhaps the best light on how this procedure was first operationalized. Documents in my sample show a checklist of categories used to evaluate claims, focusing on submitted documents and the claimants’ written and oral testimony. As can be seen in Figure 1, below, the categories for evaluating testimony were Specific/Generalized; Consistent with I-589/Inconsistent with I-589; Convincing/Unconvincing; and Credible/Not Credible. A January 1992 memo from then INS Head of Asylum, Gregg Beyer, would formalize the parameters of Asylum Officers’ assessments for the first time.<sup>119</sup> They were listed as “internal consistency,” “detail,” “plausibility,” and “demeanor.”<sup>120</sup>

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114. See Establishing asylum eligibility, 8 C.F.R. § 208.13(a) (2022).

115. See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., NEXUS AND THE PROTECTED GROUNDS TRAINING MODULE (2019), [https://www.uscis.gov/sites/default/files/document/foia/Nexus\\_minus\\_PSG\\_RAIO\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/document/foia/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf) [<https://perma.cc/3YBF-SVUG>].

116. *Id.* at 10–11.

117. U.S. CITIZENSHIP & IMMIGR. SERVS., ASYLUM DIVISION AFFIRMATIVE ASYLUM PROCEDURES MANUAL (AAPM) (2012), <https://www.aila.org/File/DownloadEmbeddedFile/57216> [<https://perma.cc/8TR6-9CSE>].

118. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

119. See KAHN, *supra* note 80, at 183 n.83.

120. *Id.*

**Figure 1. Categories For Evaluating Credibility – Early 1990s<sup>121</sup>**

<p><u>REQUEST BASED ON:</u></p> <p><input type="checkbox"/> Race</p> <p><input type="checkbox"/> Nationality</p> <p><input type="checkbox"/> Religion</p> <p><input checked="" type="checkbox"/> Political Opinion</p> <p><input checked="" type="checkbox"/> Membership in Particular Social Group</p> <p><u>DOCUMENTS:</u></p> <p><input type="checkbox"/> Specific</p> <p><input checked="" type="checkbox"/> Generalized</p> <p><input type="checkbox"/> Relevant</p> <p><input type="checkbox"/> Irrelevant</p> <p><input type="checkbox"/> No Documentation</p>	<p><u>TESTIMONY:</u></p> <p><input type="checkbox"/> Specific</p> <p><input type="checkbox"/> Generalized</p> <p><input checked="" type="checkbox"/> Consistent with I-</p> <p><input type="checkbox"/> Inconsistent with</p> <p><input type="checkbox"/> Convincing</p> <p><input type="checkbox"/> Unconvincing</p> <p><input type="checkbox"/> Credible</p> <p><input type="checkbox"/> Not Credible</p> <p><u>PRELIMINARY ASSESSMENT:</u></p> <p><input type="checkbox"/> Grant</p> <p><input checked="" type="checkbox"/> Deny</p> <p><input type="checkbox"/> Non-committal (if so, why?)</p>
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Other changes at this time included a formal differentiation between past and future persecution; the extension of grants of permanent, rather than temporary, residence for those granted asylum; and the ability to seek work authorization while a claim was processed.<sup>122</sup> While these early changes suggest the emergence of a somewhat humanitarian ideological approach, this approach would change through the 1990s as the system increasingly reflected competing views about the nature and function of asylum and suspicion of potential for abuse.<sup>123</sup>

### iii. Seeking Fairness Through Administrative Efficiency

In 1994, as the number of new claims grew to 150,000 per year, the INS proposed a new rule that would facilitate “expeditious removal” for asylum seekers whose claims were unsuccessful.<sup>124</sup> In 1995 and 1996, a series of “asylum reforms” sought to increase administrative efficiency in decision-making by streamlining documentation.<sup>125</sup> Additional reforms brought in under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) sought to disincentivize so-called “frivolous” claims by barring eligibility for anyone who claimed asylum after more

121. The Author uncovered this form during archival research. It was utilized during the early 1990s, though the precise timeframe in which this exact form was used is unknown.

122. CONG. RSCH. SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 11-12 (2019).

123. See *infra* Section III.A.iii.

124. David A. Martin, *The 1995 Asylum Reforms*, CTR. FOR IMMIGR. STUD. (May 1, 2000), <https://cis.org/Report/1995-Asylum-Reforms> [<https://perma.cc/SQ7C-J884>] (stating that before 1995, if an Asylum Officer did not approve a case, they provided lengthy, written denial letters, and that the 1995 reforms replaced this with a brief checklist and a referral to the immigration court).

125. *Id.*

than one year in the United States, creating a delay of at least 180 days before an applicant could apply for a work permit, and introducing the option of expedited removal for those who did not establish a credible fear.<sup>126</sup> The IIRAIRA also officially established expedited removal.<sup>127</sup> During this same window, the government also sought to decrease asylum applications by increasing the number of border guards, sensors, and detection or prevention mechanisms, particularly along the border between the United States and Mexico.<sup>128</sup> Those in favor of the changes, and of limiting asylum overall, heralded them as a success: new applications declined from 150,000 in 1995 to 35,000 in 1999, and the backlog also decreased.<sup>129</sup>

During this period, public opinion and policy motivations began to shift away from a view of asylum seekers and refugees as individuals in need of refuge in a country with a proud history of offering sanctuary, to one which was increasingly concerned about pressures on and potential abuses of the system.<sup>130</sup> Key among these concerns were potential threats to national security and abuse of the asylum system as a “backdoor” way to secure work authorization or to enter the United States with the intention of living without documents.<sup>131</sup>

### B. Reinforcing a Legal Fortress

#### i. Operationalizing a Politics of Exclusion

The decade following the passage of IIRAIRA showed a move away from competing ideological claims to one in which the system is operationalized. As previously noted, by the mid-1990s somewhat of a cultural consensus was reached about asylum seekers. While the system retained some elements of humanitarianism, its primary function at the

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126. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009, § 604(a) (codified as amended at 8 U.S.C. § 1158(a)(2)(B)) (one-year filing deadline); *id.* § 601(a) (codified as amended at 8 U.S.C. § 1101(a)(42)) (defining refugee); 8 C.F.R. § 208.4(a) (2022) (regulations for the one-year application deadline and its limited exceptions).

127. IIRAIRA, § 302(a) (codified as amended at 8 U.S.C. § 1225(b)(1)(B)(iii)(I-II)) (providing for expedited removal for asylum seekers who do not establish a credible fear).

128. ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, *LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY* 25 (2014).

129. Martin, *supra* note 124; *see also* RUTH ELLEN WASEM, CONG. RSCH. SERV., R41753, *ASYLUM AND “CREDIBLE FEAR” ISSUES IN U.S. IMMIGRATION POLICY* 3 (2011).

130. Drew DeSilver, *U.S. Public Seldom Has Welcomed Refugees Into Country*, PEW RSCH. CTR. (Nov. 19, 2015), <https://www.pewresearch.org/fact-tank/2015/11/19/u-s-public-seldom-has-welcomed-refugees-into-country/> [https://perma.cc/N42R-YRSD].

131. John M. Goshko, *Revised Political Asylum System Shows Promise in Early Stages*, WASH. POST (July 9, 1995), <https://www.washingtonpost.com/archive/politics/1995/07/09/revised-political-asylum-system-shows-promise-in-early-stages/e71b5512-66d7-484b-89a3-4509567e5b56/> [https://perma.cc/7679-X9TL].



time was seen as protecting the state against threats of abuse from would-be economic migrants, criminals, and terrorists.<sup>132</sup> The continued implementation of these policies saw both new claims and the backlog fall steadily. By 1997, new applications had dropped to almost two and a half times lower (55,000) than their peak in 1995 (150,000).<sup>133</sup> The backlog decreased from 464,000 pending affirmative asylum claims in 2003 to roughly 55,000 by the end of 2006, to just more than 6,000 pending claims in 2010.<sup>134</sup>

It was also during this decade that the first claim processing guidance was published.<sup>135</sup> Along with lesson plans for Asylum Officers trained at the time, documents from this time shed light on how a framework for the assessment of credibility was central to the formalization process. Asylum Officers are instructed to assess whether facts—both material to the claim and generally known—support the claim, and whether the claim includes sufficient detail, in particular sensory detail, to indicate firsthand knowledge of the events.<sup>136</sup> Claims are also to be assessed for plausibility, defined as whether the facts asserted by the applicant “conform to the objective rules of reality.”<sup>137</sup> Lastly, consistency over time and candor, or a quality of being “open, sincere and honest” are also considerations, though they are more relevant in the evaluation of spoken testimony during interviews.<sup>138</sup> These metrics—facts, detail, plausibility, consistency, and candor—formed the structural framework for establishing credibility.

#### ii. Asylum Processing in the Department of Homeland Security

In 2003, asylum processing was given a new home in USCIS under the newly created Department of Homeland Security (DHS), and measures were taken to increase the already significant discretion given

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132. *Id.*

133. WASEM, *supra* note 129, at 3.

134. *Id.* at 9.

135. *See, e.g.*, KAHN, *supra* note 80, at 183 n.83; *INS Issues Guidelines from Women’s Asylum Claims*, AM. IMMIGR. LAWS. ASS’N, <https://www.aila.org/infonet/ins-guidelines-from-womens-asylum-claims> [<https://perma.cc/95LV-PZN5>] (showing a memorandum from May 26, 1995, which provided guidance on the adjudication of women’s asylum claims based on gender); *Sexual Orientation and Asylum*, AM. IMMIGR. LAWS. ASS’N, <https://www.aila.org/infonet/ins-sexual-orientation-and-asylum> [<https://perma.cc/CRX2-QEQX>] (showing a document from April 4, 1996, which provided guidance on asylum claims based on sexuality); *INS Guidelines for Children’s Asylum Claims*, AM. IMMIGR. LAWS. ASS’N, <https://www.aila.org/infonet/ins-guidelines-for-childrens-asylum-claims> [<https://perma.cc/9A34-VH9S>] (presenting a document from December 10, 1998, which instituted guidance for children’s asylum claims).

136. *See* 2016 TRAINING, *supra* note 6.

137. *Id.* at 51.

138. *Id.* at 70.

to Asylum Officers in their application of the existing guidelines.<sup>139</sup> Crucially, the already-established concerns about terrorism, first raised in the mid-1990s, allowed most post-9/11 legal responses to be absorbed into existing mechanisms, including those raised in the 2005 REAL ID Act.<sup>140</sup> These provisions further increased the burden of proof, expecting asylum seekers to provide “corroborating evidence” of their experiences, to prove their persecutor’s “central” motives, and introducing “demeanor” as an additional axis along which to assess credibility.<sup>141</sup>

Throughout the 2000s, more than 2.4 million people were removed from the United States,<sup>142</sup> and pressure again mounted on the asylum system. By the end of 2013, the asylum case backlog had ballooned to more than 40,000, with 28,000 of those claims filed in 2013 alone.<sup>143</sup> Beginning in the summer of 2014, those seeking asylum were increasingly women, children, and families fleeing violence in Central America.<sup>144</sup>

This is also the period during which the profile of those entering and seeking to enter the country, particularly at the United States-Mexico Border, began to change. In 2010, the top countries of origin for affirmative asylum seekers were China, Mexico, Haiti, Ethiopia, and Nepal.<sup>145</sup> By and large these countries were also those with the most asylum seekers granted status,<sup>146</sup> with the exception of Mexico (it was 18<sup>th</sup>).<sup>147</sup> By 2014 the picture shifted considerably. While China remained

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139. Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 611 (2012).

140. See Melloy, *supra* note 42.

141. *Id.* at 650–51.

142. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Immigrant Deportations Declined in 2014, But Remain Near Record High*, PEW RSCH. CTR. (Aug. 31, 2016), <https://www.pewresearch.org/fact-tank/2016/08/31/u-s-immigrant-deportations-declined-in-2014-but-remain-near-record-high/> [<https://perma.cc/EM44-LCXJ>].

143. Cheri Attix, *The Affirmative Asylum Backlog Explained*, AM. IMMIGR. LAWS. ASS’N (Apr. 2, 2014), [https://www.immigrantjustice.org/sites/immigrantjustice.org/files/AILA\\_Explanation%20of%20the%20Affirmative%20Asylum%20Backlog\\_4.2.14.pdf](https://www.immigrantjustice.org/sites/immigrantjustice.org/files/AILA_Explanation%20of%20the%20Affirmative%20Asylum%20Backlog_4.2.14.pdf) [<https://perma.cc/9U9M-N2LZ>].

144. Jonathan T. Hiskey, Abby Córdova, Diana Orcés & Mary Fran Malone, *Understanding the Central American Refugee Crisis*, AM. IMMIGR. COUNCIL (Feb. 1, 2016), <https://www.americanimmigrationcouncil.org/research/understanding-central-american-refugee-crisis> [<https://perma.cc/9QS6-HX3F>].

145. DORIS MEISSNER, FAYE HIPSMAN & T. ALEXANDER ALEINIKOFF, *THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD* 11 (2018), <https://www.migrationpolicy.org/research/us- asylum-system-crisis-charting-way-forward> [<https://perma.cc/NZD7-BW62>].

146. Monica Li & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL’Y INST. (Aug. 23, 2011), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-2010> [<https://perma.cc/5LMX-GGHM>].

147. See OFF. OF IMMIGR. STAT., *2010 YEARBOOK OF IMMIGRATION STATISTICS* (2011), [https://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2010.pdf](https://www.dhs.gov/sites/default/files/publications/ois_yb_2010.pdf) [<https://perma.cc/VK5U-QB4A>].

at the top of the list of countries of origin for affirmative asylum seekers, the remaining top four countries were all in Latin America: Mexico, Guatemala, El Salvador, and Venezuela.<sup>148</sup> From 2010 to 2016, as Latin American countries dominated the top countries of origin from which asylum seekers arrived, the chances of being granted affirmative asylum at initial decision<sup>149</sup> fell from a nearly 40% grant rate to just over 10%.<sup>150</sup>

The Obama Administration responded to the increase in volume of affirmative asylum applications with the introduction of additional measures to process these claims quickly,<sup>151</sup> catalyzing the erosion of the standardized procedural protections established in the previous decades. The complex and ultimately fruitless attempts at comprehensive reform during this era reflect the increasing tensions, not just between parties and elected representatives, but across the country as well. Between 2013 and 2016, marked politicization of attitudes towards immigrants was increasingly evident, especially along major political party lines.<sup>152</sup> By early 2016, rhetoric about immigration emerged as a focus in the presidential election, with then-candidate Donald Trump in particular focusing on threats posed by refugees.<sup>153</sup>

### iii. A Functional Ban on Asylum

The Trump Administration brought increased attention to the U.S. asylum system. A combination of administrative changes, such as prioritizing newly-arrived asylum seekers' claims first—an attempt to avoid allowing those waiting years to benefit from work authorization in the meantime<sup>154</sup>—and larger, more structural changes to the way the

148. MEISSNER ET AL., *supra* note 145, at 10–11.

149. This figure is only affirmative claims and only at the initial administrative decision made by USCIS, not outcomes for cases referred to immigration court or beyond.

150. In 2010, asylum seekers filed 28,442 affirmative claims of which 11,244 were granted. MEISSNER ET AL., *supra* note 145, at 11 tbl.1; OFF. OF IMMIGR. STAT., *supra* note 143, at 43 tbl.16. In 2016, 114,993 affirmative claims were filed and 11,457 were granted. MEISSNER ET AL., *supra* note 145, at 11 tbl.1; OFF. OF IMMIGR. STAT., 2019 YEARBOOK OF IMMIGRATION STATISTICS 43 tbl.16 (2020).

151. Jennifer Chan, *Rocket Dockets Leave Due Process in the Dust*, NAT'L IMMIGR. JUST. CTR. (Aug. 11, 2014), <https://www.immigrantjustice.org/staff/blog/rocket-dockets-leave-due-process-dust> [<https://perma.cc/4YS9-T9NW>].

152. Bradley Jones, *Americans' Views of Immigrants Marked by Widening Partisan, Generational Divides*, PEW RSCH. CTR. (Apr. 15, 2016), <https://www.pewresearch.org/fact-tank/2016/04/15/americans-views-of-immigrants-marked-by-widening-partisan-generational-divides/> [<https://perma.cc/32HY-636B>].

153. See Michèle Lamont, Bo Yun Park & Elena Ayala-Hurtado, *Trump's Electoral Speeches and His Appeal to the American White Working Class*, 68 BRIT. J. SOCIO. S153 (2017).

154. *Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling> [<https://perma.cc/N7XJ-VFMA>] (describing how priority will

United States engages with the international protection system broadly,<sup>155</sup> radically changed the legal and social climate around asylum. Credibility came under increasing scrutiny as Trump Administration officials took aim at asylum seekers, accusing them of lying. In mid-2019, then-President Trump stated, erroneously, “[t]he biggest loophole drawing illegal aliens to our borders is the use of fraudulent or meritless asylum claims to gain entry into our great country.”<sup>156</sup>

Chief among the Trump Administration’s efforts to reduce asylum were the negotiation of several so-called “safe third-country” agreements in Central America, designed to facilitate the removal of asylum seekers from the United States to other countries where their claims could be considered,<sup>157</sup> and the highly controversial Migrant Protection Protocols (MPP), more commonly referred to as the “Remain in Mexico” program.<sup>158</sup> Taken together, these measures are often referred to, more bluntly, as an “asylum ban.”<sup>159</sup> The effect of these policies has been to drastically reduce the ability to seek asylum at the U.S.-Mexico Border, placing those waiting in border towns in significant danger, those in the

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be given to the “most recently filed affirmative asylum applications” and that the “aim is to deter individuals from using asylum backlogs solely to obtain employment authorization by filing frivolous, fraudulent or otherwise non-meritorious asylum applications”); cf. Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 AM. U. INT’L L. REV. 43, 69–70 (1994) (noting that the purpose of asylum reforms which decoupled work authorization and asylum was to reduce incentives for filing spurious claims to obtain access to the labor market).

155. See, e.g., Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235) (overhauling the asylum system and imposing new bars on relief).

156. *President Donald J. Trump is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis*, THE WHITE HOUSE: FACT SHEETS (Apr. 29, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis> [<https://perma.cc/5P8M-623W>].

157. Tania Karas, *How Trump’s Bilateral Deals with Central America Undermine the U.S. Asylum System*, PUB. RADIO INT’L (Oct. 2, 2019), <https://www.pri.org/stories/2019-10-02/how-trump-s-bilateral-deals-central-america-undermine-us-asylum-system> [<https://perma.cc/NHZ5-SJEM>].

158. Press Release, Dep’t Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [<https://perma.cc/Y8NH-RWP8>]; *Know Your Rights: Migrant Protection Protocols & “Remain in Mexico,”* NAT’L IMMIGR. JUST. CTR., <https://immigrantjustice.org/know-your-rights/know-your-rights-migrant-protection-protocols-remain-mexico> [<https://perma.cc/L2SW-8YKR>].

159. See, e.g., *What You Need to Know About Trump’s Asylum Ban*, AM. FRIENDS SERV. COMM. (Nov. 26, 2018), <https://afsc.org/news/what-you-need-know-about-trumps-asylum-ban> [<https://perma.cc/XXY9-QUFR>]; *Important Changes for Asylum Seekers Under the Trump Administration*, IMMIGR. EQUAL., <https://immigrationequality.org/legal/legal-help/asylum/important-changes-for-asylum-seekers-under-the-trump-administration/> [<https://perma.cc/SK52-TNDN>] (June 3, 2020).

United States in long-term detention, and raising significant concerns about violence and a lack of due process.<sup>160</sup>

To date, this era reflects the most significant attempt to restructure the asylum system since the early 1990s. Even as many of these changes remain part of ongoing legal challenges,<sup>161</sup> much of the effort to reduce access to asylum persists under the Biden Administration, with no sign of slowing.<sup>162</sup> It is clear that this era is characterized by deeply ideological arguments about asylum and an all but total abandonment of any of the humanitarian principles which remained, to greater and lesser extents, during the previous eras.

#### IV. Narrating Asylum: An Empirical Analysis of Claims

The asylum system has, as evidenced in earlier parts of this Article, always been highly discretionary and centered on assessments of elusive criteria. It is the claims themselves that have generated the material form and content of what it looks like to claim asylum and to narrate experiences or fear of persecution. These narratives reveal how claims draw on available cultural resources—those that reflect the ideological orientations of the asylum system at the time of which they apply—and what aspects remain constant, what variations develop, and what becomes institutionalized in an enduring way. The narratives overlap and diverge in important ways, shaping and limiting what is “tellable” and what is not,<sup>163</sup> resulting in the emergence and evolution of norms relating to both narrative structure and substance within asylum petitions.

Situating the evolution of asylum in a historical context is important because it contextualizes legal and administrative shifts in a discussion of relevant social, political, and cultural changes over time. In many ways, the historical narrative is a top-down story about how powerful actors in

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160. Jonathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), <https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico> [<https://perma.cc/MZJ8-YCU7>].

161. E.g., Nicole Narea, *The Supreme Court Has Delivered a Devastating Blow to the US Asylum System*, VOX (Sept. 12, 2019), <https://www.vox.com/policy-and-politics/2019/9/12/20861765/supreme-court-ruling-asylum-rule-southern-border> [<https://perma.cc/5YQY-MUMV>].

162. Azadeh Erfani & Jesse Franzblau, *Recycling Trump's Asylum Bans & Expanding Title 42: How Biden's New Policies Threaten to Undermine Asylum Rights for Generations to Come*, NAT'L IMMIGR. JUST. CTR. (Jan. 9, 2021), <https://immigrantjustice.org/staff/blog/recycling-trumps-asylum-bans-expanding-title-42-how-bidens-new-policies-threaten> [<https://perma.cc/6GBN-RPZX>]; Adam Isacson, *How the Biden Administration May Keep Asylum Out of Reach After Title 42*, ADVOC. FOR HUM. RTS. IN THE AMS.: COMMENTARY (Feb. 17, 2021), <https://www.wola.org/analysis/biden-asylum-after-title-42/> [<https://perma.cc/E6C7-JCP5>].

163. See Diane E. Goldstein & Amy Shuman, *The Stigmatized Vernacular: Where Reflexivity Meets Untellability*, 49 J. FOLKLORE RSCH. 113 (2012).

law and politics govern asylum with organizational structures, incentives, and processes that align with and further those actors' ideological or organizational goals. In the sections that follow, I combine a discussion of the social, political, and legal changes taking place within and around the asylum system with an analysis of individual narratives.

My analysis reveals how both the institutional requirements for claiming asylum and what it looks like to narrate persecution have changed considerably over time. By evaluating the historical evolution of the asylum system and combining it with a close reading of the narratives of asylum seekers, I demonstrate how asylum narratives reflect the creation of new strategies of action that integrate structural requirements and evolve to accommodate broader cultural and legal understandings of asylum. This interaction between the top-down changes to law and policy and the bottom-up strategies employed by individuals reveals the ongoing power of culture to inform what ideas and actions are successful during periods of change, and the power of law to shape which approaches and understandings are institutionalized.

#### *A. Data and Methods*

##### *i. Data Collection*

To document and discuss these narrative changes, I employed content analysis of a stratified random sample of documents created in the preparation of 120 asylum claims filed between 1989 and 2018 by nationals of 33 countries.<sup>164</sup> To be included in the sample, claims had to meet the following criteria: the asylum seeker had to be over the age of eighteen when they filed; the case had to be closed; the asylum seeker had to have had the benefit of legal representation throughout the process; and the file had to contain at a minimum the information necessary to complete the questions asked on an I-589 and some form of written declaration, and the written documents had to be sufficiently legible.

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164. This sample is part of a larger sample of archival documents relating to the preparation of over 4,000 claims collected at non-profit legal service providers in the United States during 2018. The original sample was reduced by applying the following criteria: cases had to be closed and claimants had to have been adults with the benefit of legal representation throughout the process, and written narratives or declarations had to be legible enough to be analyzed. These criteria resulted in a smaller archive of documents prepared in support of just over 1,000 asylum cases, which I then open-coded for primary experiences of violence or persecution. This produced forty specific ways to characterize violence, which I stratified into four broad categories which emerged from the data: political opposition; sexual and gender-based violence (SGBV); lesbian, gay, bisexual or transgender (LGBT) identity; and those who fled revolutionary conflicts in Central America during the late 1980s and early 90s. *See infra* Figure 2. From my final sample of 120, I randomly sampled 30 cases from each of these four broad categories. I then cleaned, anonymized, and coded these documents in the software package MaxQDA.

This data set is large and provides access to types of documents that are historically harder to access. However, it does have its limitations. As previously noted, all documents were prepared with individuals who had access to a lawyer. Having legal representation is a distinct advantage in the asylum process, and attorneys, as I discussed earlier, play a role in the development of all claim materials, including narratives and declarations.<sup>165</sup> Asylum seekers who have an attorney are 20% more likely to be granted asylum by USCIS<sup>166</sup> and five times more likely to be granted status by an Immigration Judge.<sup>167</sup> However, limiting the sample in this way was an unavoidable consequence of analyzing a large but accessible set of diverse documents.<sup>168</sup>

Lawyers also play a significant role in shaping and drafting narratives, of course, but unless they are engaging in unethical behavior, they do not construct them from scratch. Lawyers, and often legal assistants and volunteers, are important actors who facilitate the process of narration by framing the biographical inquiry to elicit the nature and level of information and detail required to meet the fluctuating standards.<sup>169</sup> They are not, however, the storytellers. Instead, their input tends to focus more heavily on the legal framing of the entire claim, such as determining if someone who was subjected to gendered violence during conflict would be more likely to succeed by foregrounding particular legal questions.<sup>170</sup> They also seek out and prepare supporting evidence, such as psychological assessments, other forms of medical evidence, and expert testimony attesting to conditions in the claimant's country.<sup>171</sup> They manage the coordination, documentation, and presentation of the claim.<sup>172</sup> For asylum seekers, the rules, conventions, and styles required in narrating their experiences can become additional barriers to accessing protection. As such, lawyers are instrumental in overcoming barriers, such as cultural difference in presentation of

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165. See sources cited *supra* note 113 and accompanying text.

166. SCHOENHOLTZ ET AL., *supra* note 128, at 133.

167. *Who is Represented in Immigration Court?*, TRAC IMMIGR. (Nov. 28, 2017), <https://trac.syr.edu/immigration/reports/491/> [<https://perma.cc/SJA4-Z6NV>].

168. There are, to the best of my knowledge, no large repositories of asylum files which permit research access outside of legal service providers, and any files that could otherwise be collected may not have been as complete or covered as wide a range of claims in terms of country of origin, year of filing, or characteristics of the claimants.

169. Amy Shumam & Carol Bohmer, *Representing Trauma: Political Asylum Narrative*, 117 J. AM. FOLKLORE 394, 398 (2004).

170. See Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 172 (2000).

171. *Id.*

172. *Id.*

experiences,<sup>173</sup> the limits of understanding a process in a language which you do not speak,<sup>174</sup> and the effects of criminological frames often projected onto asylum stories.<sup>175</sup>

ii. Sampling Frame

The sampling frame consisted initially of 4,800 available cases. Of these, just over 40% (1,983) met the requirements outlined earlier. I then conducted exploratory content analysis and stratified the cases into segments based on persecution type as articulated in the claimant's I-589 application. While many claimants describe a range of harms or types of persecution, cases are stratified based upon the articulation of the *central* experience or fear of persecution that animates their claim. This is distinct from the formal grounds enumerated in the Convention—race, religion, nationality, political opinion, or membership in a particular social group—as almost all claimants invoke multiple grounds.<sup>176</sup> Indeed, only nine claims in the sample invoke a single legal category, with the majority invoking two, and one-third invoking three or more. The categories of political opinion and membership in a particular social group co-occur most frequently, regardless of the nature of the violence experienced.

I argue that it is these categories of violence which emerge from the claims themselves that provide a meaningful analytic framework for understanding the stories in the sample. This stratification strategy is not designed to reveal the legal categories of persecution as enumerated in the Convention and in domestic asylum law and policy. Rather, it is designed to bring into focus the ways that the stories are constructed and told. It is an emergent structure, one which revealed itself as the data were coded, illuminating the significant role played by the nature of violence experienced in the construction of asylum narratives. In brief, people may make legal claims based on their political opinion, but they do not *tell stories* of political opinion—they tell stories of experience. They recount police brutality, illegal detention, rape, stalking, lost jobs and farms, harassed family members, torture, and lost relationships. This phenomenon is unsurprising given the complicated demands for

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173. *Id.*; Michel-Acatl Monnier, *The Hidden Part of Asylum Seekers' Interviews in Geneva, Switzerland: Some Observations About the Socio-Political Construction of Interviews Between Gatekeepers and the Powerless*, 8 J. REFUGEE STUD. 305, 305 (1995); Anthony Good, *Witness Statements and Credibility Assessments in the British Asylum Courts*, in CULTURAL EXPERTISE AND LITIGATION: PATTERNS, CONFLICTS, NARRATIVES 94, 114 (Livia Holden ed., 2011).

174. COSTAS DOUZINAS & ADAM GEARY, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE 72 (2005).

175. See Michael Welch & Liza Schuster, *Detention of Asylum Seekers in the UK and USA: Deciphering Noisy and Quiet Constructions*, 7 PUNISHMENT & SOC'Y 397 (2005).

176. U.N. REFUGEE AGENCY, *supra* note 85.



combinations of personal trauma and collective identity in the process of determining eligibility and credibility. Attempts to understand stories, then, must necessarily look for emergent categories beyond the legal structure.

For example, a total of twenty-three narratives in my sample focus substantively on political revolution, either because the applicant was involved as a combatant, assumed erroneously to be a combatant or a supporter, or because they were displaced as a result of revolutionary conflict. Legally these claims sit at the intersection of political opinion—often either an articulated political position, such as advocating for local land ownership, or membership in a specific political party—and/or membership in a particular social group (PSG); and in some cases, race or ethnicity, including indigeneity. Claiming membership in a PSG is especially common in claims based on social categories not specifically captured in Convention grounds,<sup>177</sup> such as engaging in labor organizing. This intersectionality is the legal architecture of a claim rooted in the causes and consequences of political revolution, but it tells us nothing of the individual's experience.

Additionally, this same constellation of legal components—political opinion, PSG, and race—is seen in cases with a substantive focus on sexual and gender-based violence. In these cases, women in particular are constructed as both politically opposed to gender-based violence and personally targeted because of a local climate which tolerates, or even supports, such abuse. This climate is often exacerbated in the case of women who are indigenous or part of underrepresented or targeted ethnic groups. But in both categories—political revolution or sexual and gender-based violence—the substance of the stories themselves is always the unique nature of violence.

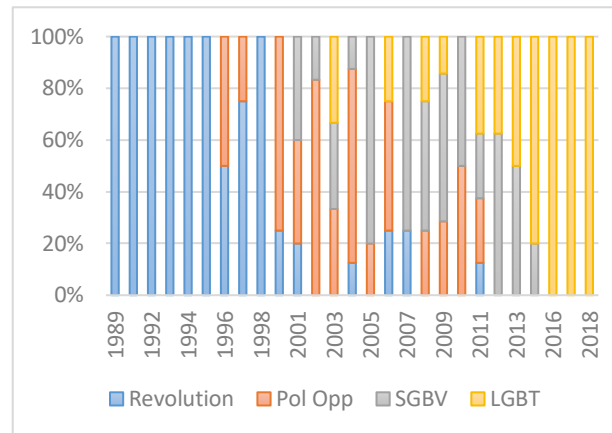
I employed initial exploratory content coding for all mentions of experiencing violence. This revealed forty highly-specific violence types, which I then consolidated into four main categories: (1) political opposition (such as being a member of an opposition or minority political party, or involvement in other forms of political opposition, such as being a member of a labor union or political social movement); (2) sexual and gender-based violence (including domestic violence, rape, female genital cutting, and forced marriage); (3) LGBT violence (persecution on account of sexuality or gender identity); and (4) displacement specifically of revolutionary armed conflict. I then sampled thirty claims randomly within each segment. As can be seen below in Figure 2, claims are not evenly distributed over time. The changing number of claims over time is a function of the types of violence and persecution causing displacement

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177. *Id.*

at various times, the evolution of judicial responses to claims which then open or close legal doors for further claims, and, as I will detail in the following section, a result of changes to the asylum process.

**Figure 2. Claims by Type 1989–2018**



The volume of claims is also not evenly distributed over time, with claims before 1996 constituting the smallest part of the sample (n=18). The small relative number of claims during this period is due in part to the capacity of my data collection sites in the late 1980s and early 90s. They were much smaller then and able to serve relatively fewer asylum seekers. Additionally, many records were hand-written and stored in hard copy, leading to more illegible or incomplete files for this era.

### iii. Coding

I approached the narratives with a method inspired by sociologist Mark Suchman’s approach, in which he understands “contracts as social artifacts.”<sup>178</sup> Like contracts and other artifacts, asylum narratives are “both technical systems and communities of discourse,” with material uses enabling practical technologies and cultural meanings that “act not as technologies but as symbols.”<sup>179</sup>

After collecting, anonymizing, and categorizing all narratives by type, I used the qualitative data analysis software MaxQDA to code and analyze the data. I used the narratives to develop coding categories for

178. Mark C. Suchman, *The Contract as Social Artifact*, 37 *LAW & SOC’Y REV.* 91, 92–93 (2003).

179. *Id.* at 92.

interpretation.<sup>180</sup> Employing a grounded theory analytic-inductive approach, I coded the narratives by identifying analytic categories and themes as they emerged from the data.<sup>181</sup> To innovate and modify existing theories, I systematically coded narratives in dialogue with one another, and alongside close readings of salient themes in the sociology, law, migration, and culture literatures.<sup>182</sup> Grounded theory coding involves two phases: first, conducting *initial coding* to determine what the data suggests about narrating asylum, remaining open to the theoretical possibilities that might emerge; and second, using *focused coding* to pinpoint and develop the most salient categories that emerged.<sup>183</sup> The second round of coding was motivated by the institutional categories that emerge from documents, such as training manuals and other guidance to decision-makers. These categories capture, in part, the institution's own understanding of how asylum claims should be narrated.

The primary purpose of the coding scheme was to identify the content and changes over time to narrative substance and structure. Coding focused both on the substantive ways experiences of violence and persecution are described, as well as lexical and grammatical patterns that provide insight into how claimants interpret and make sense of the law and world around them.<sup>184</sup> Structurally, I coded for word length; formality; word choice; presence of explicitly legal language; and presence of explicit commentary on legal tests, such as timeliness, eligibility, credibility, truth, or similar concepts. Substantively, I coded for descriptions of violence (physical, emotional); specific types of harm (forced marriage, threats to kill); temporality (narrating experiences or narrating whole lives); level of detail, especially sensory detail; internal consistency as evidenced by information provided by the claimant in other parts of the process; external consistency evidenced by reference to expert or other third-party sources; and alignment with relevant ideological or cultural scripts (such as opposition to communism). I also coded for references to memory, trauma, and agency or power in decision-making.

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180. See KRISTIN LUKER, SALSA DANCING INTO THE SOCIAL SCIENCES: RESEARCH IN AN AGE OF INFO-GLUT 80–83 (2008); David A. Snow, Calvin Morrill & Leon Anderson, *Elaborating Analytic Ethnography: Linking Fieldwork and Theory*, 4 ETHNOGRAPHY 181, 193 (2003).

181. See BARNEY G. GLASER & ANSELM L. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH 237–51 (2009); KATHY CHARMAZ & RICHARD G. MITCHELL, *Grounded Theory in Ethnography*, in HANDBOOK OF ETHNOGRAPHY 160–74 (Paul Atkinson et al., eds., 2001).

182. Stefan Timmermans & Iddo Tavory, *Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis*, 30 SOCIO. THEORY 167, 175 (2012); Stefan Timmermans & Iddo Tavory, *Advancing Ethnographic Research Through Grounded Theory Practice*, THE SAGE HANDBOOK OF GROUNDED THEORY 493, 496–97 (2007).

183. CHARMAZ & MITCHELL, *supra* note 181.

184. See JOHN J. GUMPERZ, DISCOURSE STRATEGIES (1982).

*B. Shifting Norms, Shifting Narratives**i. Navigating Informality in Early Asylum Narratives*

The overt role of politics, and in particular anti-Communist ideas, is evident in early asylum narratives. Documents in my sample relating to claims prepared between 1989 and 1996 (n=18) reflect only stories of political opposition and displacement as a result of revolutionary civil conflict. These early cases shed light on the emergence of the asylum narrative form as an attempt to create and develop a claim in the absence of detailed top-down guidance.

Structurally, these narratives are brief, with an average length of under one thousand words, and they tend to focus concretely on the events or circumstances that led directly to the need for asylum. In some ways these claims adhere to a narrower interpretation of legal requirements. The substance of these narratives also reveals the power of the explicit ideological demands made on the process at the time. It is perhaps unsurprising that these narratives reflect attempts to align claimants' views and actions with the mainstream anti-Communist and ideology dominant at the time. For example, these narratives from Eduardo<sup>185</sup> in 1990, a Salvadoran, and Lorenzo in 1993, a Nicaraguan, reflect the narrow ideological focus and expression of personal political beliefs, as well as a largely unedited structure:

By this means I address to you in my most sincere and respectful way with the purpose to show the following. The Communist Guerrillas of my country tried to recruit me to fight with them. I was approached by a group of men, who had hidden fire-arms and told me I should join them to fight to gain liberty in our Country. That our Country was under the control of the imperialist Americans. I told them I couldn't, they told me if I did not join, I was a traitor and deserved to be eliminated. (Eduardo)

I never wanted the Communist system but the Somoza's Government was killing the young Nicaraguan people so, I joint the people of Nicaragua to get out the Somoza's regime. After the Sandinistas got into power [they] wanted the communist system into Nicaragua, and thousands of International Communists got into Nicaragua. I had problems since the I when I started to defend and protect the young people that I knew. They were democratic and not Somocistas. At the time I become an enemy of the Sandinistas also because of my political ideas, that were and are democratic and believe in liberty and freedom (Lorenzo)

These narratives are also presented in a less formal manner, and most (n=10) include phrasing that suggests an acute awareness of the discretionary nature of decision-making. For example, Lorenzo's narrative finishes with "God BLESS AMERICA, that is the only one that can

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185. All names have been changed.

give the peace and protection we need.” Others make it clear they are “respectfully” seeking asylum, or as Victor, a Salvadoran claiming in 1995 writes, “I fervently wish that I be granted political asylum.”

While seventeen of the eighteen cases in this part of the sample are from Latin America, there is one West African case which invokes many of the same concepts as the others even though the context is quite different. In preparing a 1996 declaration, a young Nigerian man, Osawe, discusses why he joined an opposition party, noting that he believed the party would improve the share of political power, would “maintain democracy,” and would give “all people a voice in government.”

The fact that these data represent only two of the claim types is also interesting. On the one hand, civil conflicts in Central America were displacing large numbers of individuals, especially to California, but there are claims in this part of the sample that discuss experiences of violence that could have led to a different framing. For example, the two claims in this part of the sample from women recount sexual violence as evidence of political persecution by the guerrillas, but their claims focus on the political aspects, rather than the gendered nature, of their experiences. These sentiments are extremely common, as are characterizations of Communist groups as “anti-American,” anti-freedom, and anti-prosperity. The political opportunity structure of the time made centering resistance to Communism particularly effective and legible and may even have elevated other forms of persecution, such as gender-based violence, from a presumption of private harm into a solidly public example of persecution.

#### ii. Rising to the Challenge of Formalization

The reforms of the 1990s had significant structural and substantive effects on the way that asylum narratives evolved over the next two decades. Early narratives, constructed less in the shadow of law and policy guidance than in the absence thereof, now began to reflect both institutional adjudication needs and prevailing cultural and political logics about how to tell stories of persecution, fear, and eligibility.

Structurally, these narratives expanded considerably, moving from a narrative focused on the relatively discreet description of experiencing or fearing persecution to a whole-life narrative that provides significantly more detail. By the late 1990s, nearly 90% of narratives begin with the claimant’s early life. In fact, one-third begin with the exact same phrase: “I was born.” This phrase serves as a sort of “once upon a time” to begin the narratives. By 2000, the average declaration tripled in length to about 3,000 words, and typically exceeded 4,500 words by 2008.

Other indicators of the shift to a whole-life structure include discussions of domestic life, such as information about family size,

structure, and relationships; specific mention of access or lack thereof to formal education and work experience; significant cultural markers such as weddings or funerals; and attempts to demonstrate personality. Narratives are woven through with statements about or examples of desirable personality traits, such as “I always had a lot of friends,” “my siblings and I were always good students,” or “it was a happy marriage.” These whole-life markers imbue the narratives with both the weight of a life—with all its many relationships, obligations, and experiences—and an emotional sense of how it was lived.

While the structural change from persecution-specific to whole-life narrative is consistent across claim types, the narrative content provides a window into claim-type specific differences. Beginning in the late 1990s, a combination of proliferating global contexts giving rise to a variety of types of persecution and an expanding judicial and policy-driven framework for constructing a wider variety of harms and fears under the Convention’s categories allowed the asylum process to tolerate greater substantive “incoherence”—that is, there are more ways to narrate an asylum claim, and greater flexibility in how experiences are presented. This institutionalization of type-specific ways to claim asylum emerges alongside expectations that claims retain sufficient elements of the standard form to be legible. This tension manifests in greater levels of substantive coherence within claim types and a tighter adherence to the enumerated metrics—facts, detail, plausibility, and candor.

One example of greater substantive coherence is how LGBT and sexual and gender-based violence (SGBV) narratives are more likely to focus on the long-term effects of having experienced violence or trauma. These claims tend to focus on the consequences of persecution and how claimants live with persistent levels of fear and anxiety. These claimants are presented as “in need of saving” and frame a grant of asylum as integral to safety and recovery from trauma and abuse.

Karen from the Democratic Republic of Congo focused on her ongoing fear, describing the United States as a place she can be at peace:

I don’t want to sleep during the night because I am afraid of my nightmares which feel so real. I often wake up screaming, sweaty and short of breath. I am tired of living a life where I am constantly scared, where I have to hide. I want to live in peace.

For other claim types, especially political opposition claims, narratives focus instead on the individuals as agentic and risk-taking and constructing their actions, as necessary. Yonas from Ethiopia worked as a political activist for a pro-democracy party, and acknowledged the risks he took and decisions he was able to make, stating:

I knew that as I became more and more vocal about what the Ethiopian government did to my cousin, my own life was at risk. So I decided to leave my beloved soccer, my wife, my family whom I may

never see again to seek asylum and save my life.

These claimants are constructed as being at risk, but not necessarily as being as vulnerable as the SGBV or LGBT claims.

Claims also reveal a significant increase over time in reliance on the submission of additional evidence to establish facts and speak to the plausibility of certain experiences. Until 1997, only four narratives made reference to reliance on external documentation. However, in the following decade supporting documents were mentioned in forty-one of the fifty-two filed cases, rising to forty-seven of fifty-one from 2009 to 2018. Country of origin information is by far the most common and is referenced in nearly 70% (n=82) of cases in the sample and over 90% (n=68) by 2004.

These country-of-origin documents are many claimants' best chance at demonstrating the plausibility of their experiences, fears, and actions. USCIS describes facts as plausible if they conform with "objective rules of reality,"<sup>186</sup> but the fact is that most Asylum Officers do not share an objective reality with those whose narratives they encounter and evaluate. For those seeking asylum, these documents become a way of corroborating facts, establishing consistency with information that is already accepted, and demonstrating the plausibility of your own account.

Narratives also show evidence of increasing levels of detail, in particular sensory detail, which is recognized by USCIS as a key indicator of a credible account.<sup>187</sup> Before 1996, only three (of eighteen) narratives referred to sensory experiences; by 2008, just over 70% (n=39) referred to more than one thing seen, heard, smelled, felt, tasted, or touched during an experience of persecution (n=38). Sensory detail is most often used to describe experiences of fear, deprivation, or torture, or to describe the ongoing mental and physical health consequences of such experiences. This detail serves both to enrich the account itself, and to bolster the validity of the claim, often by emphasizing the inevitability, pervasiveness, or severity of the experience. Yaro from Kenya described his experience of torture, stating:

On about four separate occasions, I was taken to a room that was nearly ankle deep in water. There were several raised rubber mats on which policemen stood while I had to stand in the water. One officer held my hands behind my back while another two officers applied live electrical wires to my ankles. The pain was incredible throughout my whole body. My heart sped up. My mind became

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186. 2016 TRAINING, *supra* note 6, at 24.

187. *Id.* at 16 ("It is reasonable to assume that a person relating a genuine account of events that he or she has experienced will be able to provide a higher level of detail, especially sensory detail, about that event than he or she could if the account were not genuine.").

disoriented. It was a terrible shock.

Sensory detail is often also used to enhance narratives when other concrete facts cannot be recalled, or perhaps were never known to the claimant, such as in the narrative of Bashim from Turkmenistan:

I don't have a sure idea of the time. It seemed like the beating went on for a long time, but it was probably about twenty minutes. Periodically they would force me to stand up so that they could karate chop me on the back of my neck. A few times they broke ammonia capsules in front of my nose to revive me.

As demonstrated above, patterns emerge in the way that violence and experiences are narrated, highlighting ongoing reliance on tropes and stereotypes about who should claim asylum, how those people can and should behave, and what kinds of experiences warrant an offer of permanent residence.

### iii. Resisting Political and Personal Exclusion

From late 2008, the narratives began to reveal this institutionalization by type, but also a return of stronger ideological forces shaping the system. The styles and habits, namely the comprehensive structure and the adherence to the explicit metrics, do not fall away from the narratives. Instead, these narratives reveal attempts to connect unique, detailed experiences of violence with overarching ideological positions in ways that had not been as common since the early focus on Communism. In effect, we see the strategies and tools developed and institutionalized in the previous two periods acting as cultural resources to shape the current highly structured and highly ideological form.

One example of this more explicitly ideological turn is evident in narratives based on SGBV or LGBT identity, because both reveal a resurgence of conventional gender role stereotypes. For example, in the SGBV narratives there is a shift in the way that women describe experiences of and, crucially, responses to violence. They remain highly structured and detailed, yet almost universally include a passage describing how the women resisted violence. This expectation of resistance is now a relic in other areas of U.S. law. As late as the 1970s, for example, it was not uncommon in rape prosecutions to expect a victim to evidence "utmost resistance"<sup>188</sup> to being sexually assaulted.<sup>189</sup> Women's

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188. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 8 n.50 (1977) (first citing *Reidhead v. State*, 250 P. 366, 366 (Ariz. 1926); then citing *Starr v. State*, 237 N.W. 96, 97 (Wis. 1931)).

189. *Id.*



resistance in particular was seen as a kind of proxy for virtue, alongside other requirements, such as timely complaint.<sup>190</sup>

Beginning as early as the 1960s, these expectations started to fall away in rape prosecutions, driven at least in part by an acknowledgement that the crime of sexual assault is defined by the actions of a perpetrator, not of a victim.<sup>191</sup> As such, the return of this kind of language to SGBV asylum claims in the late 2000s is suggestive not of a reflection of evolving legal approaches, but a regressive cultural attitude towards women, credibility, and the power dynamics involved in sexual violence.

Evidence of standardization of women's responses to that violence first emerged in late 2008 and is illustrated by the tensions around representations of rape and sexual assault and female genital cutting. Esther from Liberia recounts her physical resistance as she was sexually assaulted by a soldier, stating "I struggled to move my body any way I could . . . I tried to keep my legs closed but I couldn't. I was too tired and in too much pain. Finally, I stopped resisting." Similarly, Femke, a young woman from Burkina Faso describes resisting ceremonial genital cutting:

When I was 7 years old, my family arranged for me to undergo the ritual. The ceremony was performed at my grandmother's house with a group of 11 girls. I tried to run away, but I could not run very fast because of [a problem with] my leg, and some boys caught me. There are always boys there to catch girls who try to run away.

LGBT narratives increased significantly after 2010. Only two LGBT claims were prepared before 2009 and more than half (n=17) were filed in 2015 or later. These narratives represent the system's increasing openness to claims based in sexuality and gender identity (particularly so in California), and yet these narratives emerge in a form that reflects traditional gender stereotypes. One particularly common narrative trend is the characterization of realizing one's sexuality in childhood because of a preference for traditionally male or female toys, hobbies, or clothing. Marcos, a gay man from Colombia notes, "When I was little, I preferred to play with the girls rather than the boys. I liked to play indoor games with my hands inside the house or inside the school. I did not like to play soccer or other sports." Similarly, Fernanda, a lesbian from Brazil, describes noticing that there was something "different" about her around age six noting, "I liked to play with my brother's toys, and I did not like spending time with the other girls around me. Instead, I preferred to hang out with the boys, playing soccer and with toy cars." This "when did you know were gay" trope of noticing difference in childhood, or having an internal

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190. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815 (1991); John Dwight Ingram, *Date Rape: It's Time for No to Really Mean No*, 21 AM. J. CRIM. L. 3, 11 (1994).

191. Eric Sandoval, *The Case for an Affirmative Consent Provision in Rape Law*, 94 N.D. L. REV. 455, 460-62 (2019).

moment of coming out to oneself, before experiencing any persecution or fear thereof seems to be a narrative expectation for an LGBT asylum narrative, despite being entirely irrelevant from the standpoint of legal interpretation. Notably, in narratives in which a heterosexual relationship is central to a claimant's experience of violence, there are no instances in my sample of anyone being asked, or voluntarily offering, when they knew they were straight.

Further, ideological shifts are evident in the rise of narratives in which individuals either disavowed Islam or go to great lengths to explain their faith and how they practice it, even though religious persecution is not central to these claims, but instead are raised in political opposition cases. In these cases, claimants can reject a fundamentalist approach to Islam while also expressing that their own views align with an idealized American value of religious tolerance. Mariam from Mali describes the following:

The way that I believe in Islam is different from my father. The Koran does not say that girls must not go to school. Girls must be able to learn the Koran and must practice Islam. My father believes that girls must cover their entire bodies, and not even show any hair. I believe that my father practices such strict Islam so that he can be recognized in society as being very correct. I do not believe that is the right way to practice Islam.

These narratives reveal how recent claims strive to situate individuals as adhering to traditional values regarding gender and sexuality. This practice demonstrates a deeper and more ideological entrenchment of the type-specific institutionalization of claims. These narratives reflect the highly structured nature of the system, paired with a shift toward the kind of ideological coherence last seen during the most fevered years of perceived threats from and staunch opposition to Communism. Currently, we again see explicit ideological demands being made on the system, but with a shift to all but eradicate structural opportunities to incorporate these demands into the existing institutional framework. Whereas the competing ideologies and cultural strategies of the 1980s and early 1990s gave way to increased focus on structure and accountability, this era seems poised to dismantle the existing structures without replacement.

### **Conclusion: Making Asylum Possible**

Credibility is not given definition, but it is given meaning, power, and possibility through the asylum process. This happens as institutional norms are infused with politics, undergo processes of bureaucratization, and evolve in response to imperatives and opportunities presented by social and cultural shifts in the way asylum is framed. The substance of credibility takes shape in the narratives of those seeking protection. In

this way, it is the existence of the entire system: the individual, the institution, and the interaction between them that makes credibility, as an ambiguous category, possible.

My analysis shows how both the institutional requirements for claiming asylum and what it looks like to narrate persecution have changed considerably over time. By evaluating the historical evolution of the asylum system and combining it with a close reading of the narratives of asylum seekers, I demonstrate how asylum narratives reflect the creation of new strategies of action that integrate structural requirements and evolve to accommodate broader cultural and legal understandings of asylum and credibility. This interaction between the top-down changes to law and policy and the bottom-up strategies employed by individuals reveals the ongoing power of culture to inform what ideas and actions are successful during periods of change, and the power of law to shape which approaches and understandings are institutionalized.

In our contemporary moment, asylum has been in many respects reduced to a debate about fundamental questions of truth, membership, and violence. In the asylum system, laws and policies granting or denying protection become agents not just of a discrete administrative corner of the state, but of cultural change itself. Given the robust cultural space occupied by the law, and the complex set of practices that surround adopting, altering, or dispensing with legal change, it is perhaps more likely that these seemingly administrative adjustments are the best evidence of a new cultural model that is likely to “take root and thrive,”<sup>192</sup> making their impact more likely to endure in the long-term.

This analysis is also relevant for considering the interplay between culture and institutions in immigration control more broadly. When the law in particular institutionalizes some strategies of action, it can and does have a power effect on other cultural actors, especially those that are more distant from the locus of ideological power or change. For example, an institutional culture which permits the kind of contemporary efforts we see to distrust, demonize, and exclude asylum seekers from the legal process is connected to a rise in armed border militias taking matters into their own hands.<sup>193</sup> The ideological view that migrants cannot be trusted is not only culturally, but practically cascaded from the institutional space of law and policy into the more pedestrian spaces of everyday life. This is how myths become political truths: when the

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192. Swidler, *supra* note 48, at 280.

193. Simon Romero, *Militia in New Mexico Detains Asylum Seekers at Gunpoint*, N.Y. TIMES (Apr. 18, 2019), <https://www.nytimes.com/2019/04/18/us/new-mexico-militia.html> [<https://perma.cc/GT4V-ZY4P>].

principles of social organization are brought into harmony with the new foundational ideology.<sup>194</sup>

As much as the legal system might suggest that asylum seekers need to do nothing more than document and verify objective realities, the fact remains that, as essayist Elaine Scarry writes, other people's pain is inherently "unshareable" and therefore beyond both denial and confirmation.<sup>195</sup> Physical markers like bullet wounds are proxies for pain, not proof of it. We want these stories to make other people's pain and fear real in part because we want the truth to matter.

Stories matter critically, not only because people who have suffered loss or trauma are understandably eager to access limited resources and assistance, but because those with the power to judge these narratives and provide access to new national membership are eager to access the "truth" of atrocity. Concerns related to knowledge and credibility in the context of refugees and asylum seekers are real and pressing, in part because our ability to understand and respond to the kinds of atrocities and human rights violations depends on knowing, as best we can, what is happening in both nature and scale, when, where, and to whom. And yet, as long as the process remains political and discretionary, responses to both individual claims and collective experiences of violence and persecution will be imperfect at best and, at worst, will become merely another tool of an immigration governance system built on exclusion, violence, and death.

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194. William H. Sewell, *Historical Events as Transformations of Structures: Inventing Revolution at the Bastille*, 25 *THEORY & SOC.* 841, 874 (1996).

195. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 11-12 (1985).